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In The Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,

Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX A (VOL. II OF III) TO
PETITION FOR WRIT OF CERTIORARI

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ARTICLE: EXCLUSIVE JOINT VENTURES AND ANTITRUST POLICY Herbert Hovenkamp *

* Ben V. & Dorothy Willie Professor of Law, the University of Iowa. The author was consulted in two decisions discussed in this article: by the state Attorneys General in Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993); and by Dean Witter in SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D.Utah 1993), rev'd, 36 F.3d 958 (10th Cir. 1994).

SUMMARY:

... A joint venture is created whenever two or more economic actors ("firms")join together to engage in some economic activity .... The Antitrust Legacy Concerning Joint Venture Exclusion ... For example, the VISA/Dean Witter case is an antitrust dispute that arose when Dean Witter, the owner of Discover Card, was denied its request to join the VISA joint venture If the joint venture as a unit lacks market power, the simple failure to maximize is not ordinarily an antitrust concern... In the VISA case, for example, the effect of the exclusion was to prevent the introduction of Dean Witter's VISA/Discover Card package, and existing Visa members from issuing proprietary cards of their own -- but this product exclusion was accomplished simply by excluding Dean Witter from the Visa joint venture altogether .... Economically, market power is a firm's ability to profit by raising price above marginal cost .... Does any

aspect of the challenged venture or the exclusion rule or practice being challenged threaten to reduce output or raise prices in some properly defined relevant market? In addressing this question, the court must first define relevant markets under ordinary antitrust principles for any market level at which competition might be threatened ....

TEXT:
[*2]

I. Introduction

A joint venture is created whenever two or more economic actors ("firms")join together to engage in some economic activity, nl **[*3]** The firms participating in a joint venture need not be competitors, and often they are not, but antitrust liability generally requires that they be either competitors or potential competitors.

Joint ventures engage in a wide array of economic or productive activities: research and development, exploration for resources, advertising and promotion, production, distribution, or creation of the market. They may be legally organized as partnerships or corporations, n2 or they may simply be private contractual agreements, n3 The legal form of organization is seldom relevant to the analysis presented here. The mechanism by which decision-making occurs is often relevant, however, and the legal form may influence the form of decision-making.

A joint venture exists when two conditions are satisfied: (1) two or more firms join together to produce one or more of the inputs n4 that go into their production or distribution process, but (2) this union is something less than the formation of a single firm. Joint ventures' principal relevance to antitrust policy is that, while they often result

in lower costs or improvements in product quality or distribution, they can also threaten competition.

Most joint ventures are efficient. However, that fact is not sufficient for antitrust to withhold its concern. If a venture produces no efficiency gains whatsoever but yields only injury to competition, then antitrust policy condemns it automatically as illegal per se. More common, however, is the venture that produces efficiency gains but also yields opportunities for anticompetitive [*4]behavior. In that case, antitrust policy makers must devise administrable rules that permit the efficiency gains to occur while reducing or eliminating the opportunities for anticompetitive behavior. Alternatively, if the opportunities for anticompetitive behavior cannot be eliminated, the antitrust policy maker must decide if the welfare gains are sufficient to justify the loss of competitive incentives.

Joint ventures raise antitrust concerns when they facilitate the exercise of market power, or threaten to do so. n5 As a general matter, the exercise of market power can come about by collusion or by exclusion. In a collusive arrangement, venturers who have market power collectively reduce marketwide output and raise the price of some product or service that the venture controls. The antitrust remedy depends on the degree of the competitive threat, the legitimacy and efficiency potential of the underlying venture itself, and the essentiality of the price or output fix to the functioning of the venture. For example, if a court finds that the "joint venture" itself is nothing more than a front for naked collusion, it is likely to condemn the entire venture as illegal per se. The Supreme Court did this, erroneously, in its very first antitrust decision on the merits, the Trans-Missouri Freight Association case. n6 The Court

saw a joint operating agreement among railroads, having great efficiency potential, as nothing more than a cartel. It granted the government's request to dissolve the entire arrangement. **[*5]**

If the venture is obviously efficient but the price fix or output restriction seems unnecessary to the functioning of the venture, then the court may appropriately enjoin the price fix or output restriction without touching the venture itself. For example, in National Collegiate Athletic Association ("NCAA") the Supreme Court enjoined the defendant from limiting the number of times that college football teams televise their games; but no one suggested using the antitrust laws to destroy the entire joint venture producing NCAA football, n7 If the venture is obviously efficient and the price fix or output restriction is an integral part of the venture, then the court may have to perform some fairy delicate balancing. For example, in the Broadcast Music decision, it permitted a joint venture that clearly had some market power to use a blanket license scheme that effectively involved artists and other performance right holders' fixing the prices of their intellectual property, n8 The Court was persuaded that, given the transaction costs of any realistic alternative, the joint venture resulted in greatly reduced prices or higher output, notwithstanding the price fixing, n9

Joint ventures can also exercise market power by exclusion, which occurs when existing venturers refuse to admit a firm that wishes to join, or expel a firm that wishes to stay in the joint venture. Anticompetitive exclusion can also occur when the venture disapproves a product or service that one group of venturers wishes to provide but that a decisive number nl0 of the venture's decision makers

prefer not be provided by any [*6] venture member. We refer to the first of these forms of exclusion as "member exclusion" and the second as "product exclusion." nl 1 Some joint ventures do both at the same time.

In exclusion cases antitrust policy has the difficult job of determining how the exclusion operates within the overall plan of the joint venture. An exclusion may be nothing more than a cartel facilitator. Cartels work successfully only if they can maintain their market shares, and member exclusion may be a method by which colluding venturers keep others from cutting into their markets. For example, if venturers A, B, and C have developed a process that gives them a cost advantage over rivals X, Y, and Z, the first three firms may be in a position to collude. But if X, Y and Z are permitted to join, there may be as much competition as there was before the venture was formed. Exclusion of X, Y and Z may relegate the excluded firms to the position of a high-cost fringe, perhaps having only a modest impact on the cartel profits.

Product exclusion can perform the same function. For example, firms fixing the price of steel conduit (or operating in an oligopoly) may preserve market dominance by excluding a rival product, plastic conduit, from the market or limiting its growth, n12 In order to accomplish this, the firms need not exclude the maker or potential maker of plastic conduit from the venture; they need only exclude its product. Likewise, a collusive group of insurers offering policies providing fairly narrow insurance coverage may feel threatened by rival insurers who wish to offer broader coverage, which customers prefer. The dominant insurers may respond by using the venture to deny the rivals access to essential inputs, such as statistical data

necessary for determining risks, or reinsurance necessary for spreading risks, n13 Once again, the firms wishing to offer the alternative product need not be excluded from the venture; only the product itself need be excluded.

Joint venture "exclusion" thus refers either to decisions that exclude a member or applicant for membership, or to decisions that exclude a product. "Exclusion" also refers to decisions that [*7] remove a product from the market altogether, prevent its entry, limit its growth or raise its cost. For example, the defendants in the Allied Tube case conspired to set standards that encouraged local governments to write building codes prohibiting the use of the plaintiffs plastic conduit, n14 The success of this scheme did not require the defendants to convince every single local government or private contractor to avoid plastic conduit; they merely had to convince enough of them to slow or limit plastic conduit's growth potential. Likewise, the Visa joint venture n15 did not need to force the applicant, Dean Witter, out of the general purpose charge card market altogether; its exclusionary rule was profitable if it simply limited the extent to which Dean Witter could cut into the market shares of established Visa members. "Exclusion" thus refers both to rules that keep firms out of the market altogether, and to rules that make it more difficult for firms who are already in the market to grow. n16 Under the right circumstances, both kinds of exclusion injure competition and harm consumers.

The difficult problem for antitrust policy is that the very same exclusions that facilitate anticompetitive behavior may have been essential to create the incentives to form the venture in the first place. Firms invest in joint ventures in order to improve their own market position; if everyone in the market has an automatic right to join, then the incentives to form the venture are correspondingly reduced.

This article attempts to identify the appropriate concerns of antitrust policy for joint ventures that engage in either member exclusion or product exclusion. Many exclusions are competitive and may even be essential to the success of the venture or to guaranteeing incentives to create similar ventures in the future. At the same time, however, we fear joint ventures because they may facilitate the exercise of market power, and successful acquisition or exercise of market power often requires some kind of exclusion. For example, if applications for membership are numerous, the cartel that admits all applicants will not be [*8] able to reduce marketwide output, which is essential to successful collusion, n17

Given that a joint venture's exclusivity rules can work either benefit or harm, bona fide exclusions should be governed by a rule of reason. Although that premise seems uncontroversial enough, it has not always been so, and the courts have traditionally looked at exclusivity rules, particularly exclusive membership rules, with hostility. They have often been treated as illegal per se. n18

At the other extreme is the view that joint venture exclusion rules pose only the most modest of competitive threats, no greater than occurs when a single firm refuses to cooperate with a rival, n19 But if one of these views is too hostile, the other is too sanguine. Joint ventures are efficient to the extent that they bring together firms who can take advantage of scale economies or diverse specialties. But they also unite firms that [*9] have different incentives. A joint venture is not the same thing as a merger; it is composed of two or more different firms, each of which wishes to maximize its own profits, n20 Where the profit maximization goals of individual members coincide with maximization of returns to the venture as a whole, the venture for all practical purposes operates as a single firm. But where these goals differ, the venture may be more likely

to behave anticompetitively. To the extent joint ventures are composed of individual profit-maximizing entities, the incentives of members may deviate substantially from the best interests of the venture as a whole, with "best interests" defined as the outcome that maximizes venture-wide profits. To the extent this is true, the joint venture operates more as a cartel than as a single firm. n21

"Network" Joint Ventures

Writers sometimes speak of "network" joint ventures as if these were a distinct classification, n22 But economically speaking, a network joint venture is not very distinguishable from joint ventures generally. All successful, competitive joint ventures either reduce costs or shift demand. They reduce costs by achieving economies of scale or scope not readily available to the venturers acting individually. They shift demand by improving products or by introducing new products that have not been on the market previously. They can also reduce transaction costs and force the internalization of externalities, particularly when intellectual property rights are not adequate to prevent others from free riding, n23 **[*10]**

The "network" joint venture is one that operates in an area where joint production or distribution is said to be necessary before the product can even exist, at least in the form offered by the joint venture, n24 Associated Press, NCAA football, long distance telecommunications since the AT&T divestiture, automated bank teller ("ATM") networks, n25 and MasterCard or VISA are all network joint ventures in this sense. Associated Press is a consortium of newspapers who create news stories for each other. The NCAA is an association that creates, among other things, the game of college football, makes its rules, administers its schedules, and the like. Since it takes at least two teams to have a football game, in one sense the product being

produced, "NCAA football," could not exist without at least some joint activity, n26

But this observation adds very little to any conception of the network joint venture as special. Indeed, the statement is true only given the NCAA's own starting rules and assumptions as a premise -- for example, that each college campus can have only one football team. Under an alternative arrangement a single college could have multiple teams playing "intramural" football, or a multi-campus university such as the University of California could have games among its campuses (such as UCLA v. U.C. Berkeley). So collegiate football as we know it could not exist without the venture, but football itself in some alternate form might survive quite well. Likewise, the entire NFL could be owned by one very large firm. Thus, saying that "NCAA football" or "NFL football" could not exist without a joint venture is certainly true, but it is no different than saying that "GM-Toyota" would not exist without the General MotorsToyota joint venture.

Further, given today's telecommunications system in the United States, it is impossible to make a long distance call **[*11]** without the cooperation of the local operating companies plus one of the long distance carriers. This joint venture is very literally a "network." Calls are routed from the caller via her local operating company to the long distance carrier's transmission facilities, from there to the long distance carrier's reception facilities and then back into a different local system to the person being called. But, in the nature of things, a joint venture is not essential to the production of long distance telecommunications. Indeed, before the 1983 decree that broke up the telephone company, n27 first all and later most long distance calling was made within a single firm, AT&T. n28

The same is true of the bank card industry. "MasterCard" is a joint venture composed of numerous card issuing institutions, and the venture itself acts as a clearing house, or broker, enabling debits and cash to flow from the card holder's bank to the merchant's bank. n29 But the same activities can be performed by a single firm, as in the case of American Express or Discover.

The most meaningful understanding of a "network" joint venture is that it is a kind of joint venture that creates economies in the ongoing production or distribution of a product. Often a research or development joint venture concludes its work when a certain product or process has been developed. Individual firms then take over the business of manufacturing and marketing. Other joint ventures are temporary in the sense that, although they may involve production or distribution, their real purpose is to facilitate learning, n30

In the "network" joint venture, by contrast, ongoing production or distribution of the product is done more efficiently by **['12]** the venture than it could be done by each participant individually, given the way that production and the market are organized. Further, under existing technology or distribution modes, or under our existing system of property rights or firm ownership, this situation is stable. As a result, the venture has a quasi-permanent character. NFL football provides a good example. As long as we have football as we now know it, where individual teams are separately owned and controlled, where at least two teams are needed to play a game under a common set of rules and schedules, and where teams are expected to play through a field of opponents and ranked on the basis of their records, some kind of joint venture is essential to the production of professional football. One might conceive of a different world in which a single firm owned and managed all the teams. In that case, coordination of football would be

nothing more than a parent corporation's operation of its subsidiaries, and no joint venture would be necessary. One can generally say the same thing about the St. Louis railroad terminal facility, n31 Associated Press, n32 and ASCAP's blanket licensing arrangements covering performance rights, n33 Alternative regimes could exist in which (a) a single firm owned all the players and operated them within the firm, or (b) a regulatory agency imposed the coordination of inputs on the participants.

In sum, then, joint ventures are artificial devices that represent an efficient method of engaging in enterprise given a particular set of assumptions about property rights and ownership. Changes in the nature of property rights or the scope of the firms owning them, may make existing joint ventures unnecessary or may create a market for new ventures. The relevant antitrust policy questions must focus not on whether alternatives to the venture are theoretically possible, but on whether the existing venture restrains competition given the system of property rights that already exist.

Joint ventures are also a "market" alternative to regulation. The joint ventures in the Trans-Missouri Freight Association case, n34 the Terminal Railroad case, n35 and the case of the telephone ['13] company all illustrate this. The first two cases represent elaborate ventures among railroad companies to coordinate routing, scheduling, allocation of revenue as among shipping, receiving and intermediate carders, and access to common essential facilities such as terminal points. Eventually many of these decisions were transferred to a government regulatory agency, the Interstate Commerce Commission. n36 With respect to the telephone company the chronology is just the reverse. First there was a giant telephone company, AT&T, providing both local and long distance service to almost everyone but heavily regulated by the Federal

Communications Commission. Later joint ventures developed involving, first, competing long distance carriers, and then local operating companies and long distance carriers. These ventures became necessary after deregulation permitted competition and eventually broke up AT&T and separated its long distance and local networks, n37

Once again, however, the existence or dissolution of the joint venture results from public policy decisions respecting a prior allocation of property rights. If the regulatory or property rights regime changes, some existing joint ventures may disappear while new ones may come into existence.

The role of antitrust is not to tamper with the basic regulatory regime, n38 nor to change the allocation of property rights unless the current allocation is anticompetitive. Antitrust must seek out and condemn joint arrangements that injure competition -- that is, which reduce marketwide output or innovation below the competitive level. Further, antitrust must do this without causing substantial injury to the system of incentives that motivates firms to enter efficient joint ventures in the first place. For example, expansive use of per se rules would certainly reduce the opportunity for price fixing, but in the process such rules might condemn many ventures that are, on balance, efficient. **['14]**

II. The Structural Logic of Joint Ventures

The promise of joint ventures flows from one fact: ventures are able to expand markets more readily than single firms can. Ventures do this in a variety of ways: making a product more attractive, developing new products that would be difficult or impossible to develop without joint participation, reducing the costs of production or the costs of using the market, enabling firms to better capture the results of their innovations.

A. The Joint Venture and the Firm

The best way to assess the structure and appropriate scope of joint ventures is by comparing them with firms. The same factors that account for the nature and scope of the firm explain the nature and scope of a joint venture. A firm is an organization that makes many decisions about production or distribution. With respect to each, it weighs the incremental costs and benefits of purchase on the market against the incremental costs and benefits of internal production, selecting the alternative that promises to be most profitable, n39 As Ronald Coase and Oliver Williamson have noted, using the market is itself costly. One must seek out the optimal supplier, trust the supplier to produce efficiently and sell at cost, and negotiate a contract specifying all desired terms. The less certainty one firm has about others, the stronger the case for self production. If the costs of dealing with another firm, including uncertainty costs, exceed the costs of making the input for oneself, the firm will organize this activity inside the firm, rather than purchasing from without, n40

A firm's decision to create a joint venture with another firm or to join an existing venture is in principle no different. For any given input, the firm compares the cost of purchase on the **['15]** market, of self-production, or of joint

production with one or more other firms. Risk is simply one of the many costs that must be counted. To be sure, the decision may be complicated because participation in joint ventures involves elements of both self-production and contracting. Everything that makes markets expensive, such as the need to locate proper trading partners, to trust them, and to negotiate contracts with sufficiently detailed specifications and creating the proper incentives, can apply to the formation of joint ventures as well as to outright market purchases, n41 Further, since joint ventures involve production that is "internal" to the firm, although carried on jointly with others, they also involve problems of internal firm organization. Nevertheless, the combined costs of bargaining and organizing to a joint venture may be less than the costs of either a pure market purchase or of pure self-production. When they are, the profit-maximizing firm will choose the joint venture.

As a first cut, then, joint ventures are calculated to reduce the costs or increase the revenues of participants. For this reason, they are presumptively efficient. But they are not invariably efficient, and even efficient ventures may pose competitive threats, or may be organized in alternative ways that will reduce dangers to competition.

The reason for possible inefficiencies is that although profitmaximizing firms decide whether to participate in joint ventures by weighing the costs and benefits of the venture against the costs and benefits of alternative forms of organization or contract, firms are concerned only with private costs and benefits. For example, a firm might decide whether to manufacture its transistors or purchase them from others by comparing marginal costs and benefits. But the same firm might decide whether to participate in a cartel or compete with the cartel by engaging in precisely the same calculus. Although the cartel is socially costly, the firm will participate if it calculates that **[*16]** private benefits exceed

private costs and risks, including the risk of detection and prosecution for antitrust violations.

For a firm to consider costs that are borne only by others is inconsistent with profit-maximization. As a result, the profitmaximizing firm is generally indifferent whether its improved profits come from increased efficiency or increased opportunity to exercise market power or impose burdens on rivals. A well designed antitrust policy changes incentives by increasing the costs or risks attending anticompetitive joint ventures, or by creating similar disincentives to anticompetitive rule making within joint ventures that are otherwise efficient.

B. Performance: Static and Dynamic

Traditional, or "neoclassical" economics looks at joint ventures mainly through a set of static snapshots that can exaggerate the importance of the immediate relationship between price and marginal cost. By contrast, "dynamic" economic analysis attempts to measure the tradeoff between current prices above marginal cost and the incentive to innovate. A temporary period of monopoly prices may create the incentive that firms need to develop new products, processes, or modes of distribution. In the case of the single firm, American patent policy has always understood this relationship, and an important purpose of the Patent Act n42 is to encourage firms to innovate by promising awards in the form of temporary freedom from competition, n43

The dynamic claim made for joint ventures, however, goes much beyond the assertion that single firms who innovate should acquire exclusive patent rights. The claim made for joint ventures is that the promised innovation justifies even the loss of immediate competitive incentives resulting from the structure of the joint venture

itself. For example, the comprehensive production joint venture initiated by all the firms in a market might certainly yield patented products or processes for which the venturers could claim the right to exclude rivals once the promised innovations were developed. But aside from any patents, the venture might also entail an indefinite period in [*17] which coordination of prices or exclusion of rivals is profitable. The strong claim for joint ventures is that the tradeoffs between static inefficiencies (i.e., prices higher than marginal cost) and the promise of future innovation justifies even these structural impairments of competition, n44 Further, the impairment of competition in the joint venture can last indefinitely. Nothing limits it to the Patent Act's seventeen year exclusive grant. If a venture such as BMI, NCAA, or Visa acquires the power to collude or exclude, it may hold that power both immediately and indefinitely, whether or not the promised innovations ever materialize, are shown to have social value, or produce gains large enough to offset any losses from reduced incentives to compete.

In some cases, the tradeoff between innovation gains and competition losses is undoubtedly justified. But in other cases it is not. As long as individual business firms maximize profits without regard to whether the source is increased innovation or merely increased monopoly, antitrust policy must consider at least the possibility that the real private benefits from a venture are coming from collusion or exclusion, not from innovation. Alternatively, although the venture does in fact produce socially beneficial innovation, as a by-product it may also reduce competition in ways that are not essential to the functioning of the venture.

Static analysis focuses on the short run, while dynamic analysis concentrates on long run considerations. But the same thing can be said of anticompetitive practices.

Price-fixing focuses on market power in the short run; exclusion, particularly if it is strategic, focuses on market power over the long run. When one changes from static to dynamic analysis, one must not neglect to apply it to both the competitive and the anticompetitive potential.

Static analysis, which is the traditional method of technical neoclassical economics, looks at price/cost relationships at any given instant -- for example, the relationship between price and marginal cost, or between marginal cost and marginal revenue. If price equals marginal cost, the seller is said to be behaving competitively. If price exceeds marginal cost, the seller [*18] is said to have a certain amount of market power. Under static analysis, consumer welfare is measured by reference to these same relationships. Competitive prices are said to maximize the size of consumers' surplus, and are thus consistent with maximum consumer welfare. Monopoly prices, which occur when marginal revenue deviates from price, usually take some of this consumers' surplus away, and thus are said to be inconsistent with maximum consumer welfare. Strictly speaking, static analysis does not consider where the market is going, or whether what appear to be monopoly prices today are a necessary predicate for even greater consumers' surplus at some future time. The familiar lines in a neoclassical graph of marginal cost, price, and marginal revenue simply fail to provide that kind of information.

By contrast, dynamic analysis looks at firrm behavior or consumer welfare over time. It is more inclined to see the creation and destruction of monopolies as a process, The dynamic approach looks at the lines on the neoclassical graph, emphasizes that they can be shifted, and then asks what kinds of things might cause the shifts and what are the likely results. Under dynamic analysis, the most important shifter is innovation. Further, the motivation for innovation

is economic, or monopoly, profits. At this point, static and dynamic analysis can deviate from one another rather sharply. If the goal of antitrust policy is to maximize consumers' surplus, static analysis virtually always sees monopoly as bad. By contrast, dynamic analysis begins with the premise that the availability of monopoly profits is an essential component of innovation. At least some instances of monopoly profits are simply steps in a process through which consumers' surplus is enlarged.

To take a simple example, suppose that Alcoa is one of many competing steel manufacturers. It develops a process for making aluminum, which it patents, and becomes an aluminum monopolist. Not only does Alcoa sell its aluminum at a substantial monopoly markup above its costs, but its aluminum also takes about 30% of the market formerly occupied by steel. Before Alcoa developed its process, the market sold one hundred units of steel; marginal cost was $1.00 and the price was $1.00. After Alcoa developed its process, the market sells seventy units of steel at a marginal cost and price of $1.00. It also sells thirty units of Alcoa's aluminum, for which Alcoa's marginal costs are $1.10 and the price $1.50. **[*19]**

Rigid static analysis would show a single competitive market before aluminum was invented. It would show a smaller competitive market and a second monopolized market after aluminum was invented. If the two products were lumped together in a single market, it would show average prices exceeding marginal cost, and the creation of some deadweight loss normally associated with monopoly.

Nevertheless, it would be patently silly to conclude that consumers are worse off in the partially "monopolized" market that includes aluminum than they had been in the completely competitive market that did not include it. No

consumer is being forced to purchase aluminum. Rather, some are voluntarily substituting aluminum for steel because they prefer aluminum at prevailing market prices. So consumers' surplus must be just as high under the monopolized steel-aluminum market as it had been under the perfectly competitive steel market. No consumers are worse off: those who had been able to purchase steel for one dollar in the past can still do so; those who prefer aluminum at $1.50 can purchase that instead.

In the above illustration, the development of aluminum is a Pareto improvement as well, or at least a potential Pareto improvement, even though it results in monopoly, n45 This fact is completely inconsistent with the traditional neoclassical view that perfectly competitive markets are Pareto superior -- that is, that once perfect competition has been achieved, no alternative state of market affairs can make one person better off without making at least one other worse off. The problem with neoclassical analysis is that it assumes a given list of products and preferences, and then considers what will maximize satisfactions given that list. Perfect competition is the answer, n46 **[*20]** What the analysis does not consider is that if a new product suddenly appears, buyer preferences may change, and some new equilibrium will be superior to the old one. For this reason dynamic analysis disputes the importance that traditional economic analysis attaches to equilibrium; the more interesting and most common status of markets is change, and the gains from change can dwarf the gains from stability, even when only the stable situation can be characterized as perfectly competitive.

To be sure, the new situation (competitive steel plus monopolized aluminum) is not Pareto optimal, for there are yet further improvements: consumer welfare would be even higher if aluminum were sold at its production cost of $1.10 rather than $1.50. But that is hardly the right comparison,

because it fails to consider why Alcoa developed aluminum in the first place. Suppose the law required that the instant aluminum was marketed it had to be sold at its cost of production. Why would Alcoa bother, given that it is already earning the competitive rate of return in steel? Further, if there were any amount of risk at all -- even a five percent chance that the process would not work out, so the investment in innovation would be lost -then the anticipated returns to developing aluminum would be negative.

In sum, (1) the aluminum monopoly, at least a temporary one, is necessary to create the incentive to innovate, and (2) no one is worse off if the pre-innovation market remains as an available alternative, no matter how high the monopoly price on the innovated product. Suppose, for example, that slide rules were sold for $10.00 in a highly competitive market. The inventor of the first electronic calculator, which is offered as a substitute for slide rules, can make one for $10.00 but sells them at $500.00, an extraordinary monopoly markup. This high degree of monopoly notwithstanding, consumers are not injured because anyone who wishes to purchase a slide rule can continue to do so. Those customers who opted for the calculator did so because that choice made them better off.

This analysis, quite common in the literature on innovation and growth ever since Joseph Schumpeter's day, is simple and intuitively obvious, n47 Schumpeter believed that the neoclassical **[*21]** focus on "equilibrium" seriously underestimated the impact of innovation on economic welfare. For example, the theory of competitive equilibrium assigned the highest welfare standard to perfect competition, a state of affairs where no firm earned any monopoly returns. But Schumpeter believed that this theory neglected to account for the fact that economic profits are the incentive to growth, n48 and more importantly, that a certain amount of protection from competition was

necessary to enable a firm to undergo the risks and costs of expensive innovation, n49

Schumpeter's insights began a debate that has never ended over the relationship between large firm size and innovation, or between monopoly power and the rate of innovation, n50 It is also readily applied to joint venture analysis. We respect joint ventures because they do something other than merely fixing prices or reducing output. They either permit firms to attain economies of scale or scope, which shift costs downward and thus make consumers better off; or else they reduce the costs or individual risks of innovation, broadly defined, and thus permit more innovation to occur than if all of it had to be undertaken by individual firms. In these cases, at least part of the improvement in consumer welfare is dynamic, in the sense that it results not from the elimination of monopoly, but rather from changes in cost or demand, or from the presentation of market alternatives that were not available before. **[*22]**

Schumpeter's conclusion that the gains from innovation can sometimes swamp short-term monopoly losses is relatively uncontroversial today. But this says nothing about degree or frequency, and it is hardly a foregone conclusion that monopoly invariably produces more innovation than competition. Monopoly can just as easily produce sluggishness or complacency, n51 In sum, permitting monopoly as an inducement to innovation, as the patent laws do, is very likely a welfare enhancing policy, provided we can come up with the proper set of rules for identifying the scope and nature of the monopoly we wish to permit. But a broad assumption that any creation of monopoly will naturally result in more innovation seems completely unjustified, n52

The most enthusiastic supporters of joint ventures believe that antitrust has been hostile to them mainly because it has failed to appreciate dynamic efficiency gains, and has exaggerated the effect of static efficiency losses, n53 For example, courts would look at the aluminum story recounted above and see only that aluminum is "monopolized," not that the market as a whole is larger and better for consumers. The remedies that the courts then fashioned effectively took away the rewards to innovating aluminum. Clearly, when a market dominating joint venture comes into existence one must be sensitive not only to its potential to exercise static market power through collusion or exclusion, but also to its ability to produce dynamic efficiency gains.

But the dynamic story has another side that cannot be overlooked. Writing on industrial organization often uses the words "dynamic" and "strategic" to capture two variations of the same phenomenon: that markets shift over time, and that the shifts are driven both by changes in consumer demand and by changes in firm decisions about how and what to produce. The connotations attached to "dynamic" and "strategic" are often different. **[*23]** The word "dynamic" generally looks at the market as a whole, and often emphasizes the more optimistic results of change, such as new innovation and the resulting demand for it. "Strategic," by contrast, generally looks at the extent to which individual firms position themselves or their products in order to maximize their own private returns, even though some alternative position may be best for consumers. For example, firms may select particular technologies, not because they are superior, but simply because they impose higher costs on rivals, n54 Alternatively, a group of firms may exclude a rival's product from the market simply because they fear that what the rival offers will threaten their own market shares, n55 In this way, agreements expressly designed to facilitate innovation

can actually retard it. Any approach to antitrust that wishes to take dynamic concerns about innovation and growth into account must also be sensitive to the possibility of strategic manipulation -- an equally "dynamic" concern, n56

Although joint ventures may have a great capacity to innovate, their members may also profit by retarding innovation, n57 Returning to the steel-aluminum example, suppose that the steel makers were organized into a joint venture that controls the patents for a highly efficient smelting process. Now when Alcoa, one of its more aggressive members, acquires a few patents and begins researching and developing aluminum, a controlling majority of the steel makers pass a rule that any company developing aluminum will be denied access to the smelting **[*24]** technology. Alcoa now has the choice either to leave the venture and try to develop its own smelting process, or else to cease developing aluminum. This venture has not facilitated innovation; it has retarded it.

A short sighted view of this incident is that the steel company's act had no bad economic consequences at all, assuming that the members of this joint venture were pricing their output at competitive levels both before and after the exclusion rule was passed, n58 That is to say, the competitive market for steel continues to exist. But in fact the firms acted anticompetitively: they restrained the development of a new product that threatened to steal their markets shares or deprive them of their competitive returns on investment. Just as dynamic analysis insists that we look at the longer run to see if gains are possible, so too we must look at the longer run for welfare losses. Changes in markets produce both gainers and losers. As a result, we cannot simply revert to static analysis and identify an outcome as competitive or monopolistic by looking at the relation between price and marginal cost. If dynamic analysis is to be used to justify the social improvements accompanying

joint ventures, the same analysis must be used to estimate their social costs.

But why would the steel venturers wish to exclude aluminum, given that they were earning only competitive returns anyway? A quick glance at the fate of the slide rule manufacturers provides the answer. Innovation injures non-innovating rivals of the innovated product even if these rivals were formerly behaving competitively. The innovation may give the innovator lower costs or it may significantly reduce marketwide demand for the older product. It may even put some or even all of the makers of the older product out of business, n59 In sum, **[*26]** when one looks at long run considerations, anticompetitive behavior cannot be limited to present collusion or even the ability to collude.

Strategic exclusion by joint ventures is hardly a rarity. In the last decade and a half three cases have found their way to the Supreme Court, about as many as on any substantive antitrust **[*27]** subject. They have involved both member exclusion and product exclusion, n60 Hydrolevel involved a claim that certain members of the American Society of Mechanical Engineers conspired to withhold approval of the plaintiffs mechanical safety switch, which was a technological improvement over the switch of rivals that orchestrated the disapproval, n61 Allied Tube involved an association containing manufacturers of steel conduit who agreed with each other to exclude plastic conduit, a competitive alternative, from the market, n62 The Insurance decision involved an agreement among dominant insurers to exclude from their venture long-tail insurance coverage that covered events occurring before insurance took effect or losses occurring after the policy expired, n63

In Allied Tube, a group of manufacturers of building materials, which included makers of steel conduit, n64 were members of the National Fire Protection Association ("NFPA"), an organization which developed and updated a model electric code, mainly for use by state and local governments in setting standards for construction. The code was highly influential. Many local governments adopted it virtually verbatim, and many insurance companies refused to insure buildings that did not meet the code's requirements, n65 Then, Indian Head, a relatively small firm, developed an alternative to steel conduit made of polyvinyl chloride. This plastic conduit was cheaper to make and cheaper and easier to install. Further, since it was made of a non-conductor, it was less susceptible to short circuits, n66 When Indian Head attempted to have the plastic conduit approved in the NFPA's model code, the defendant makers of steel conduit "packed" the relevant NFPA meeting with their own agents and **[*28]** employees. Allied alone sent 155 people to the meeting, most of whom had no knowledge about the merits of plastic conduit, and the new conduit was disapproved by a vote of 394 to 390. n67

One important thing to note about the exclusion of plastic conduit -- a point to which we return later -- is that the exclusion was not only inefficient, it was also inconsistent with the interests of the venture as a whole. If the venture as a whole is considered as a single firm wishing to maximize sales and profits of its various products, it would almost always profit from a new product successfully brought to market, notwithstanding that the new product reduced market demand for some older alternatives. For example, Intel profited from designing the 486 computer chip even though one effect of the new chip was to reduce demand for its older 386 or 286 chips. Further, if the venture is considered as a single firm wishing to maximize its influence with consumers of its fire code, such

as local governments and insurers, it does this by approving all safe, economically useful products and by disapproving those that are unsafe.

In sum, a single firm would ordinarily lack the incentive to withhold development of the plastic conduit simply because sales of steel conduit would suffer. The inefficient exclusion occurs because the joint venture is not a single firm: some firms in the venture are dedicated to one technology or process, while other firms are dedicated to alternatives. Some members, such as Indian Head, are better off if plastic conduit is approved. However, other members, such as Allied Tube, are better off if it is excluded.

In the Supreme Court's 1993 Hartford Fire Insurance decision, n68 liability insurers jointly participated in Insurance Services Office ("ISO"), a joint venture heavily involved in the development of insurance forms, classification and assessment of risks, and the like. One of ISO's most important duties is to collect risk and payment data with respect to each of the forms of insurance coverage offered by ISO members. Without adequate statistical data on risk and payout, premiums cannot be computed accurately. Further, the larger the base from which **[*29]** the data are taken, the more accurate the data. For many losses, individual insurers would find it uneconomical to offer the coverage if they had to rely on the risk data supplied by their own policy holders, n69

The defendant insurers, who were sufficiently large and numerous to control ISO, allegedly wished to stop writing "occurrence" policies and write only "claims made" policies. An occurrence policy covers both losses that occur while the insurance is in effect, even though the claim may be made later, and claims that are made while the insurance is in effect, even though the loss may have occurred earlier. As a result, under an occurrence policy lasting one year, the

insurer's exposure can last far longer, particularly for losses from such things as underground pollution caused by leaking gas tanks and the like. In such cases, the interval between the occurrence and the claim can be several years, because the injury may not be discovered until long after it has occurred. By contrast, "claims made" policies cover only those claims that are made while insurance is in effect. The defendant insurers also wished these policies to contain a non-retroactivity clause that denied coverage even for claims made during the insurance period, if the act upon which the claim was made had occurred before the policy took effect, n70

The defendants allegedly instructed ISO to stop gathering and promulgating the risk data necessary to compute premiums for occurrence based policies and for retroactive loss claims. As a result, smaller insurance companies that wished to continue writing the broader forms of coverage were effectively unable to do so, because their risk data were not adequate.

Once again, if the insurance joint venture had been a single firm, it would have profited by offering any form of coverage that produced enough profits to make it a worthwhile investment. If one class of customers wanted the broader coverage and was willing to pay its costs, this single firm would have offered the coverage. The anticompetitive consequences result from the fact that the venture contains two different groups of insurers, one that wishes to offer the broader coverage and one that wishes not to. If the latter group obtains control of the [*30] venture's data collection services, it can force an outcome which may be consistent with its own interests but inconsistent with the interests of the industry as a whole.

In sum, joint ventures sometimes act anticompetitively because the interests of individual members, who are individual profit-maximizing entities, are inconsistent with those of the entire market that the venture represents, but the smaller group manages to control the decision making of the venture, For this reason it is almost never appropriate to treat exclusionary acts by joint ventures as if they were acts by single firms, n71

The Allied Tube and Insurance cases also illustrate that innovation and new product design need not be tied to high technology. Often the innovation is simply a new mode of distribution that consumers prefer, or a new configuration of an old group of goods or services. The market generates a demand for the new product, process or distribution method, but the joint venture excludes or delays it.

III. The Antitrust Legacy Concerning Joint Venture Exclusion

This section briefly examines the most important antitrust decisions dealing with member exclusion or product exclusion by joint ventures. The antitrust concern is easily stated but often difficult to measure. The goal of antitrust should be to make joint ventures perform as competitively as possible consistent with maximum innovation and with preserving the appropriate incentives for entering into the venture in the first place.

In analyzing joint ventures generally, both the Supreme Court and the lower courts have traditionally emphasized shortrun, static analysis, n72 They have only rarely permitted ventures recognized to create substantial market power, and even then have permitted them only when the effect on immediate output was positive, n73 They have never approved a venture conceded to create

substantial and immediate market power [*31] upon the argument that the venture was highly likely to facilitate innovation and greater consumer wealth in the future.

Although one could argue that the Supreme Court is not taking dynamic considerations seriously enough, the refusal to acquiesce in actual, presently measurable market power on the promise of increased but uncertain innovation in the future is hardly irrational. Moreover, analysis of dynamic considerations can lead in both directions, n74 When one considers the impact of changes in demand or supply, the exclusionary acts of a venture can look both more competitive or less competitive than simple static analysis indicates. While a venture may promote innovation, it may also retard it, and one cannot presume one way or the other without close inspection.

A. Trans-Missouri and Terminal Railroad

Elaborate joint ventures are hardly new to courts deciding antitrust cases. Although the 1912 Terminal Railroad decision n75 is sometimes identified as the first important joint venture case, it is not. The very first antitrust case that the Supreme Court decided on the merits involved an ongoing, "network" style joint venture as elaborate as the one in Terminal Railroad. The Trans-Missouri Freight Association was a joint venture of 18 railroads operating in all states and territories west of the Mississippi. n76 The lower court opinion upholding the arrangement explained it very well:

The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders

it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject n77

[*32]

In the 1890s, the great majority of American railroads were state chartered corporations, and most of them operated within a single state. Further, even the largest railroads connected to only a small percentage of towns and cities. As a result, any comprehensive national railroad system had to contemplate that freight that entered the system on one carrier would be delivered to its destination by a different carrier, and there might be intermediate carders along the way. n78 Although the Interstate Commerce Commission had already been created, it lacked the authority to regulate rates, and had little authority to coordinate scheduling and routing, n79 The rationalization of this system required the railroads to have agreements with [*33] each other about scheduling, about the size and other specifications of hardware, such as track widths, about transfers of cars or cargo, and about allocating the payment for services. Generally the payment was made by the shipper to the railroad that originated the shipment, or, if sent collect, by the recipient to the railroad that delivered it. That railroad then had to distribute the payment to the other railroads that had participated. Whether this distribution could be accomplished in the 1890s (long before computers or even sophisticated adding machines) without agreements setting rates is probably debatable. Nevertheless, in an opinion that overlooked all of these issues, Justice Peckham writing for the Court condemned the Trans-Missouri Freight Association as nothing more than a price-fixing conspiracy. The result was establishment of a judicial attitude toward joint ventures that focused heavily on short-run concerns, and emphasized the dangers of price fixing, n80

Trans-Missouri was a collusion case that did not address the venture's obligation to admit new members. The Supreme Court's Terminal Railroad decision n81 is the origin of much of our antitrust policy respecting the joint venture's duty to deal with rivals. The decision is often cited and discussed with respect to both single firm duties to deal as well as the duty of a joint venture, n82 The Terminal Railroad Association itself was a single corporation organized under Missouri law. n83 At the time of the litigation, this corporation controlled all railroad lines, railroad bridges and terminal facilities needed by railroads for effective transport into and through St. Louis. n84 The Association **[*34]** permitted all railroads to use its facilities, whether or not they were members, and charged both members and nonmembers the same fees. n85 However, one could become a member of the Association -- that is, a stockholder, or joint owner, of the facilities -- only upon unanimous consent of existing members, n86 As a result, the requested relief is somewhat ambiguous. Why would the government trouble itself to get a decree ensuring equal access if equal access were already being granted? The two possibilities seem to be that (I) although the Association was currently offering equal access to everyone, it had the power to withhold access in the future, and (2) although everyone was free to become a customer of the Association, not everyone was free to become a participant, or owner, in the venture itself.

No one wanted to break up the association, however, since it was conceded by all sides to be efficient. Great economies resulted from the fact that a single channel existed for bringing railroad traffic into and through St. Louis. The Association's control of common facilities obviated the need for expensive and unnecessary duplicate lines and bridges, and it meant that all cargo could be efficiently transferred from one carrier to another. There were also collateral results that the Court did not mention.

For example, grain elevators needed to be strategically located at railroad transfer points so that they could easily load and unload the railroad cars. n87 Duplicate railroad facilities would have entailed duplicate facilities such as grain elevators as well. **[*35]**

So railroads and shippers wishing to enter St. Louis may have needed access to the Association's facilities, but why did they need ownership rights? The Court provided little analysis about the importance of ownership as opposed to access. In order to use the terminal railroad facilities, a railroad needed only to be its customer, not its owner. However, the owners were probably charging monopoly prices to everyone, including themselves, and pocketing the high profits. n88 The Court ordered the Association to charge a price that was reasonable given the costs of the facility, n89 but such a decree would be very hard to administer, even for a regulatory agency, and no federal regulatory agency in 1912 had the power to set initial rates. Alternatively, the Court allowed access to any railroad who wished to join the venture. n90

The Court's decree permitted any "existing or future railroad to joint ownership" upon terms that would place it on an equal footing with the present owners. Second, when the Association was re-organized to permit these ownership changes it "must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." n91

The Terminal Railroad decision has been cited for the proposition that under the decree a railroad could use the facilities of the association only by showing that it

needed access for its survival, n92 But the Court did not assess such a requirement, and the decree went much further than that. First, the Court required no showing that a railroad needed access to the terminal facilities. As a practical matter, access may have been necessary for a railroad wishing to bring its freight into St. Louis. However, in 1912 the United States was greatly overbuilt with tracks, and railroads that were simply shipping their products [*36] through St. Louis had numerous other alternatives. This is borne out by the fact that the venture was also found guilty of short-haul/long-haul discrimination -- that is, of charging lower rates to traffic going long distances and for which St. Louis was nothing more than a place to get across the Mississippi. n93 Indeed, the Court noted that such traffic could as easily cross the River at Memphis. n94

Further, the access question was completely answered by that portion of the decree giving every railroad the right to use the facilities upon payment of a nondiscriminatory rate that reflected the cost of supplying the service. Although a shipper might be able to show a need for access, it could hardly show a need for ownership. The first portion of the Court's decree, which applied to ownership, was not concerned with access at all, but rather with monopoly profits.

But the Supreme Court wisely saw one important thing: if the exclusionary policy were anticompetitive at all, opening up membership would be a far more tractable solution than simply imposing on the venture a duty to serve all paying customers. If the St. Louis terminal facilities were a monopoly, simply ordering the terminal association to accommodate other railroads as customers would not solve the monopoly problem. Prices would have to be regulated, and this would require the ongoing supervision of a regulatory agency. By contrast, the decision entitling outside railroads to become members effectively worked to

break up the monopoly. To be sure, the venture could charge monopoly entry fees, but these fees would have to be paid only once, and would thus require only a single visit to the court. More importantly, opening access changed the duration of the monopoly. A cartel can keep its monopoly power forever while selling to all customers willing to pay the price. But as soon as a cartel is ordered to accommodate new members the cartel itself begins to fall apart, eroding a little with each new firm that joins. [*37] B. Divergence Between Individual and Collective Goals: the Associated Press Case

The Associated Press case represents a dramatic example of how the divergence between individual and system goals can produce anticompetitive results, n95 Associated Press ("AP") was a nonprofit association of about 1200 newspapers formed for the purpose of exchanging news stories. The venture had been established in 1892 strictly as a cooperative among member newspapers. Its purpose was "the collection and interchange, with greater economy and efficiency, of information and intelligence for publication" of its members, n96 Under this astonishingly successful joint venture, the newspaper members themselves wrote news stories, mainly about events in the towns in which they were located or where their own staffs had special expertise. These stories were then distributed by telegraph or teletype ("wire service") to other member newspapers. The venture also hired its own reporters to contribute stories, and it had contractual arrangements with some foreign news services for the provision of news. n97 Association members were prohibited from selling news to non-members, and the Association itself made no such sales.

Any newspaper that wished could apply to join AP, and most were admitted. However, the Association used a series of rules that made joining more difficult if another newspaper located in the same town as the applicant was

already an AP member. Originally, any AP member newspaper could veto the application of another newspaper in the same city, provided that it also competed in the same time slot (i.e., morning, evening, or Sunday). n98 Later on, apparently fearful of antitrust challenge, AP changed the rule and permitted a vote of fourfifths of the membership to veto the veto. n99 That rule was later changed again, to permit a bare majority to approve the application, nl00 There were also financial contribution rules that discriminated **[*38]** against applicants whose town already contained an AP member, nl01

For the first time since Terminal Railroad, the Associated Press case brought to the Supreme Court a joint venture that no one wished to destroy, but whose membership rules seemed to be anticompetitive. Unfortunately, neither the district court's three judge panel n102 nor the fractured Supreme Court did an adequate job of explaining precisely why it was anticompetitive or what kinds of modifications were necessary to "fix" the venture.

The district court's opinion granted summary judgment n103 to the government in an opinion illustrating the worst aspects of the rule of reason as it had been developed in the Chicago Board of Trade decision, n104 Virtually everything was relevant, including concerns about press freedom and protection of readers' interest in diverse news sources, n105 The Supreme Court's **[*39]** plurality opinion treated AP's bylaws as little more than a naked boycott, and applied a virtual per se rule.

With a few simplifying assumptions, the economics of both the AP joint venture and its exclusion rule are easily understood. First, assume that newspapers compete intensely for readership with other newspapers located in the same town and in the same product niche (morning, evening, or Sunday). But these newspapers do not compete

at all with newspapers located in other towns. This was generally the case before 1945, and it is still substantially so today, with some exceptions, n106 Second, assume that news stories reporting the same event are more or less fungible. As a result, there is great demand for one reporter's coverage of the President's inauguration. But a second reporter's coverage of the same event would be treated as nothing more than a substitute for the first. No newspaper would want to run both.

In this case, great economies of scale inhere in the AP joint venture. For example, when the President is inaugurated the Washington Post, a local AP member, can send its reporter to cover the ceremony. That reporter can then wire the story to the other 1199 members of AP. Assuming that wiring costs are zero, AP has now permitted 1200 newspapers to share the inauguration story for less than one twelve hundredth of the cost of sending a newspaper reporter from each newspaper to cover the story.

The cost is less than one twelve hundredth because the result of the AP joint venture is not merely that the news is shared, but also that it is written by the best placed reporter. In this case, the story is produced by the Washington Post because it is much cheaper for the Post to send its reporter to the inauguration eight blocks away than it is for, say, the Los Angeles Times to send a reporter all the way across the country. Indeed, the cost of the reporter's time may be only half as much as the cost of his or her travel expenses. In that case, AP has permitted 1200 newspapers to share the cost of the inauguration for perhaps 1/2000th of the total cost that would be incurred if each newspaper had to send its own reporter. This news sharing feature is what made the AP so successful, n107 **[*40]**

Suppose that Shreveport currently has no AP newspaper and that the Shreveport Times applies for membership. The existing members can be expected to welcome the application. Up to this time Shreveport news was probably underreported because there was no sharing. If a newspaper in AP wished to report a Shreveport story it would have to send its own reporter. Of course, AP or an AP member could do the story and it would then be shared with other AP members. However, because AP has no presence in Shreveport, neither by its own staff or by a member newspaper, getting Shreveport news is relatively expensive. The addition of a Shreveport member newspaper will benefit all venture members, insofar as they would prefer to have Shreveport news at lower cost.

But now suppose that a second newspaper in Washington -- say, the Washington Tribune -- wished to join the AP venture. The President's Inauguration is already being covered by the Post, and we have assumed that all newspaper stories covering the same event are fungible. Therefore, the Tribune cannot offer the fairly dramatic kind of cost reductions that the Shreveport Times does. To be sure, there would be some cost reductions. First, the Tribune would increase by one the number of AP members sharing stories, and as that number increases, the cost to each member decreases. Further, this decrease applies not only to Washington stories, but to all stories that AP members generate. Second, if the antitrust laws permit, the Washington Post and the Washington Tribune, who share the stories anyway, may be able to work out an arrangement under which they divide the market for reporting stories, so as to avoid duplication. For example, the Post might do only politics, and the Tribune sports and crime. **['41]**

In fact, however, most of these sharing possibilities were lost as a result of another anticompetitive rule: even if AP had two newspapers in the same town, member

newspapers shared their stores with other AP members but not with the local competitor, n108 In sum, the venture as a whole would be better off if a second newspaper from a town joined, although not as much better off as it would be when the first newspaper from a new town joined.

But the one firm that would almost certainly not be better off when the Washington Tribune joined is the Washington Post. Before, the Post was the only Washington newspaper that enjoyed the very substantial cost savings brought about by AP membership. The Tribune, by contrast, had to incur all the costs of writing every story it wanted to publish. The result would be significantly lower costs for the Post than the Tribune. Since we have assumed that newspapers compete only within their own towns of publication, the result could be much larger circulation for the Post than the Tribune, or perhaps simply monopoly profits for the Post's owners.

By contrast, if the Tribune were admitted to the AP venture, then the Tribune would acquire cost savings equivalent to those enjoyed by the Post, and competition would drive prices down to a level reflecting the lower costs. Admission of the Tribune would be good for the venture as a whole -- it would reduce members' costs per story. But the Tribune's admission would be worse for the Post, who would now be a competitor rather than a monopolist in its circulation area.

In sum, then, AP's veto rule benefitted individual members that competed with an applicant. However, the rule injured the venture as a whole, which would still profit by maximizing its overall number of subscribers. If AP had been a giant firm owning all the newspapers in the various towns, and then it had a chance to acquire a second newspaper in one town, it would probably do so.

An interesting and distracting development in the AP story has suggested to some writers that the Supreme Court should never have condemned the veto rule. n109 After the Associated Press decision, and very likely as a consequence, AP came to dominate the national market for newspaper wire services. At **[*42]** the time of the AP litigation the market for newspaper wire services contained three alternative services, AP, United Press ("LIP") and International News Service ("INS"). n110 They appeared to be vigorous competitors, nl 11 Unlike AP, both LIP and INS had originally been established as proprietary systems for single sets of newspapers. E.W. Scripps had established UP as a for-profit business in 1907. Later, William Randolph Hearst established INS to serve the Hearst newspapers, although it began serving other subscribers as well. n112 Although AP had by far the largest market share, all three wire services were viable competitors, n113

The result of the Associated Press decree, which essentially opened membership to everyone, was that newspapers had every incentive to join the largest service which had the most participants and thus could obtain the news from the most different sources. Further, scale economies were such that the more members a service had, the lower the costs per news story. AP, being larger, had more offices and could draw from many more sources, n114 Many newspapers forsook UP and INS and joined AP instead, n115 UP and INS struggled along for many years, and finally merged in 1958, forming United Press International (UPI). n116 The post-merger firm did little better, and has filed for bankruptcy twice, n117

Assuming that the Supreme Court's decision forcing AP to open its membership caused the downturn of UP and INS, it becomes clear that the exclusive membership rule was not in the best interest of AP to begin with. A single firm in AP's **[*43]** position would have liked nothing more

than to become a dominant player in the market while its two rivals languished. In addition, the end of AP exclusivity caused AP to become dominant for precisely the reasons that antitrust wants firms to grow: they can achieve lower costs. The gathering of news for transmission on a wire service is probably a natural monopoly, and in an unrestrained competitive war there is probably room for only one wire service --something that the aftermath of the Associated Press decision seems to bear out. nl 18

The Associated Press decision has been criticized as incorrect because it led to this dominance -- that is, to the virtual monopolization of the wire service market, n119 But this criticism is misplaced if it purports to be based on antitrust principles. It is certainly incorrect if it is based on the premise that joint ventures should be treated as nothing more than single entities. If AP had been a single firm it would undoubtedly have wished to take advantage of every scale economy available to it, even to the point of becoming a monopolist. The AP rules permitting individual members to veto applications from competitor newspapers effectively prevented this from happening.

The effect of the Associated Press decision was to condemn a restraint that prevented the AP venture from taking advantage of the efficiencies that were available to it. Individual AP members were permitted -- contrary to the interest of the venture when considered as an economic actor -to preserve monopolies in their respective towns. The Associated Press decision shows antitrust operating in precisely the fashion that antitrust is supposed to operate.

To be sure, the world might be a better place if there were competing news services from which newspapers might choose, but this is not obvious, and in any event it is not antitrust's purpose to regulate markets but only to see that unrestrained alternatives emerge. The concern for

protecting competing news services is not about economic competition at all, but rather a concern driven by our desire to preserve variety in news gathering **[*44]** and reporting -- driven by First Amendment or press freedom rather than considerations of price and output.

Indeed, even for a "monopoly" AP, monopolization is unlikely as long as its membership structure is competitive. Since AP is an organization controlled by member newspapers, it cannot "monopolize" its market by selling to itself at a monopoly price. The only real threat of monopoly comes from local exclusivity. If Washington has only one AP newspaper, and that newspaper has a significant cost advantage over rivals, then that newspaper will be in a position to charge monopoly prices. By contrast, if Washington has competing newspapers, all of whom are in AP, they will compete away any monopoly profits and consumers will get the advantage of both newspaper competition and a wire service of efficient size.

Can AP itself monopolize the market? Hardly. Its owners are also its customers, the newspapers. AP has precisely as much market power in any market as its member newspapers have. It cannot monopolize by reducing the output of stories and charging its members higher subscription prices, any more than Chrysler's transmission division can monopolize by selling transmissions at monopoly prices to the assembly division. Of course, if an AP member newspaper is already a monopolist in its town, it will be able to charge monopoly prices -- but that is not a function of any monopoly power held by AP. If there were a second newspaper in town, however, monopoly would be diminished if the second newspaper were permitted to join AP as well.

Even the variety of stories is no greater when there are multiple news services. Although the earlier discussion assumed to the contrary, news stories about a certain event are not fungible. There may be room on the market for a dozen or more stories about different aspects of the President's inauguration. But it doesn't take a dozen wire services to generate a dozen stories. If the optimal number of stories about the inauguration were a dozen, they would be generated by a single joint venture, just as they would be by a single firm. By reducing the cost of producing and transmitting these stories, a single wire service venture very likely results in wider dissemination of a greater number of stories than would be the case if there were competing wire services with exclusive lists of subscribers, n120 **[*45]**

C. Aspen Skiing as Joint Venture Exclusion

The Aspen decision seems like an idiosyncratic joint venture case since the venture contained only two members before the challenged exclusion, and one afterwards, n121 The act of exclusion was unilateral at both the venture level and the "member" level. But this fact does not change the basic analysis, and the case offers a rather good illustration of how the interests of a single member of a joint venture can deviate from the interests of the venture as a whole.

Aspen, Colorado, offers some of the best skiing facilities in North America, if not the world, n122 The plaintiff, Highlands, was the smaller firm, operating slopes on one mountain in Aspen. The defendant, Ski Co., controlled three mountains. Since the early 1960s Highlands and Skiing Co. had participated in a joint venture offering an "all-Aspen" ski ticket that entitled its purchaser to use the ski lifts of either firm and to ski down any or all of the four mountains. n123 The principal problem that the venture faced was determining how to allocate revenues, and the partners experimented with various methods. For some

time, they simply recorded the ticket numbers of persons using the ski lifts, and allocated revenues in proportion to the times that a skier used Skiing Co.'s lifts rather than Aspen's. Later, the parties attempted a random sampling of skiers. During this period, Highlands' share of revenues varied from 13.2% to 18.5%. n124 Multi-area tickets such as the "all-Aspen" ticket became very popular, and by 1977 accounted for some 35% of the market.

Beginning in the 1977-1978 season, Skiing Co. began to demand increasingly larger shares of the revenue from sales of "all-Aspen" tickets. That year, it refused to participate in the **[*46]** venture unless Highlands were willing to accept 13.2% as its share of revenues, corresponding to the relatively poorest season that Highlands' had had in the past. After several years of negotiating and sparring over division of revenue, Skiing Co. finally told Highlands it would participate in the venture only if Highlands accepted 12.5% of the revenues, considerably less than its proportion of the traffic for any recent year. n125 It soon became clear that Skiing Co. really did not wish to participate any longer in the venture at all, and was effectively making Highlands an offer that it could not accept, n126 During this entire time, the four-mountain "all Aspen" ticket produced through the venture consistently outsold any multi-mountain ticket covering combinations of Skiing Co.'s own mountains, n127 Once the venture terminated, Skiing Co. marketed its own three-mountain ticket, Highlands' revenues dropped, reaching a low of 11 percent of total Aspen revenues by 1981, just before the antitrust complaint was filed.

The Supreme Court affirmed a jury verdict for the plaintiff, finding essentially that, although a dominant firm has no general duty to deal with a rival, deviation from an established course of conduct can have evidentiary significance that entitles a jury to find that the defendant

was monopolizing. The decision has often been criticized for seeming to push the dominant firm's duty to deal too far, n128 but many lower courts have found various methods for confining its reach, n129

Aspen is a good illustration of the differences between the incentives facing the individual firm and the incentives facing a venture precisely because the surviving "venture" contained only a single firm. The record established without contradiction that skiers consistently preferred a four-mountain ticket to any three, two, or single mountain ticket. Further, every year that **[*47]** the "all-Aspen" ticket was sold its sales exceeded those of tickets offering any smaller combination of mountains. Since the costs to the seller for a four-mountain ticket were no higher than the costs of any lesser ticket, n130 a single firm controlling the entire area would have offered the four-mountain ticket.

So why did Skiing Co. wish to stop the joint venture? Mainly because, although overall market demand was greater when the four-mountain ticket was offered, not all of the revenue from the four-mountain ticket went to Skiing Co. Figure 3 illustrates. Demand curve D is the demand for a fourmountain "all Aspen" ticket. Demand curve D', which is below D, is the demand curve for a three-mountain ticket that Skiing Co. could give alone. We assume marginal costs are constant and equal to zero. n131 **[*48]**

[SEE FIGURE IN ORIGINAL]

Given this set of assumptions, any single firm controlling the four slopes would sell a four-slope ticket. Its output would be Q, price would be P, and profits would equal P-O-Q-X. By contrast, if the firm gave only a three-mountain ticket, price would be P', output would be Q', and profits would equal the smaller rectangle P'-O-Q'-Y.

However, the important difference between the four slope monopolist and the joint venture is that in the case of the venture, the larger firm would not get all the revenues from the four-mountain ticket; it would have to share them with the other firm. If the sharing percentage were large enough, the dominant firm would find it unprofitable to participate in the **[*49]** venture. Suppose, for example, that Highland's share in the revenues from the four-mountain ticket were 20%. In that case, Skiing Co. would refuse to participate in the venture if 80% of the profits represented by P-O-Q-X were smaller than rectangle P'-O-Q'-Y. This is the decision that Skiing Co. apparently made when it decided that it was in its own best interests not to participate, n132

At the same time, however, a strong case can be made that Highlands was free-riding by claiming payment in proportion to actual use. That proportion was far more than it would have obtained in a market in which the venture did not exist. Once again, the reason is that although the cost of supplying a ski ticket does not vary with the number of mountains, demand does. Without the joint venture, Highlands would be able to offer only a single-mountain ticket and Skiing Co. would be able to offer a three-mountain ticket, n133 After the venture terminated, Ski Co's market share rose to about 89% and Highlands' fell to about 11%. The purpose of the venture -and the motive each firm would have had for entering it in the first place -- was to enlarge the sales of both parties, but probably in the same proportion that they would have been without the venture. So Skiing Co. could legitimately insist that Highlands accept a lower percentage of revenues that came closer to reflecting the percentage of revenues that it would receive in the absence of any venture at all. The venture ratcheted Highlands' position up from a one-mountain offering to a fourmountain offering; it increased Skiing Co.'s position only from a three-mountain offering to a four-

mountain offering. The result is that although venture-wide output increased, it increased much more for Highlands than for Ski Co, and may not have increased for Skiing Co. at all.

In sum, if Skiing Co. had been a single firm controlling all four slopes, it would almost certainly have offered the four slope ticket, which cost little or nothing more and generated much stronger consumer demand, n134 In itself, that fact certainly **[*50]** does not serve to make Ski Company's refusal to deal (in this case, unilateral) illegal; however, it does serve to illustrate that joint ventures and the firms within them maximize in different ways.

D. Summary

The preceding discussion has suggested the following points, which will be developed in greater detail later:

First, when we say joint ventures are efficient, we mean that they enlarge current output by either increasing demand or reducing prices, both of which are in consumers' best interests. A single firm generally profits by taking advantage of all the efficiencies available to it, and then raising output to the point that its marginal costs equal its marginal revenues. The joint venture is most efficient when it operates just as a single firm.

Second, as both AP and Aspen illustrate, individual firms within ventures have a more complex set of incentives, and different firms may have different incentives. Collectively, they profit when the venture as a whole profits through increased output, increased demand or lower costs. However, their individual fortunes also depend on their individual share of the market, or their individual share of sales within the venture. When these

interests collide, the individual member may make a decision that is inefficient because it reduces venture-wide output, but is profitable for the individual firm because it increases (or avoids diminution) of that firm's share of sales within the venture itself.

From the venture's perspective, the optimal decision is the one that maximizes the venture's profits, taking advantage of any monopoly power that the venture might have. For each individual venture member, however, there are two independent questions: (1) how big is the venture's output, and (2) how big is the individual member's share of the venture's output. Further, when individual members vote, they vote their individual choices. Thus, for example, individual members are likely to exclude a rival who threatens their own individual profits, notwithstanding that admitting the rival would increase venture-wide output. This serves to distinguish joint ventures from **['51]** firms. It also explains the anticompetitive rule in the Associated Press or VISA cases, under which the joint venture pursued a general policy of admitting all qualified applicants, but specifically excluded certain applicants who competed, n135

Third, the problem of differing incentives is exacerbated by the fact that the interests of the system as a whole must also reflect the interests of those that are being excluded. The latter category includes both those that are being expelled, as in Aspen, n136 or those that are never permitted to enter in the first place, as in Terminal Railroad, n137 Associated Press, n138 or VISA. n139 Since non-members are not entitled to vote on membership decisions, joint venture rule making processes cannot be expected to take into account the level of output that is optimal for the joint venture as a whole, n140

Fourth, if the venture as an organization lacks market power (measured system-wide), then no anticompetitive consequence can flow from individual members' decisions not to maximize the venture's output. But if the venture has market power, then when the venture's output is reduced, the market's output is reduced as well.

Fifth, as a general matter, free rider problems exist because a firm is able to take advantage of investments made by someone else, thus reducing the incentives that others have to make those investments in the first place. As a result, the hallmark of free riding is reduced output, n141 Analysis of free riding is complicated by the fact that different members may benefit from the venture to different degrees. When that happens, the firms that obtain the greater marginal benefit tend to gain **[*52]** market share, while those that obtain a relatively smaller benefit tend to lose market share, n142

But free rider problems do not always exist, and they do not exist merely because they are asserted. If the venture was closed from its inception, forcing late entry could substantially reduce incentives to the formation of similar ventures in the future. By contrast, if the venture is open to latecomers as a general matter, then free rider claims based on entry-time risks cannot be maintained, n143 Although alternative free rider claims are certainly plausible -- for example, a new member may steal the intellectual property of the venture and apply it to other uses -- they need to be established. As a general matter, such claims should be rejected if the impact of the new member's sales would be to increase venture-wide output, n144

IV. Concerted Rule-Making, Joint Venture Exclusion and the Problem of Incentives

A. Introduction: Joint Ventures as Combinations

On its output side, a joint venture often resembles a single firm. It often produces a single product or service and sometimes even acts as seller or decision maker in the market that it supplies, n145 On its input side, however, a joint venture is an association, or combination, of two or more economic actors. These actors may not have the same incentives or motives; they may be competitors but need not be. Individually they often do not have the same incentives as the stated incentives of the joint venture itself.

When examining the legality of a particular joint venture or one of its policies, the antitrust policymaker must initially decide whether the joint venture should be treated as a single **[*53]** entity or as a combination of independent actors. The answer is important because antitrust generally reserves its more hostile treatment for concerted activities. The presumption against them is often stated to be strong, at least when the independent actors are competitors. By contrast, antitrust generally looks on unilateral acts much more circumspectly, condemning them only in cases of clear market power and obvious anticompetitive effects, n146

Antitrust policy has always regarded joint ventures as combinations -- that is, as associations of independent economic actors making joint decisions. As a result, the treatment given to them has generally been harsher than the treatment accorded to single firms acting unilaterally. How much harsher depends on the question being asked and the period of antitrust history in which the answer was given. Although there have been some excesses, n147 the courts generally have been correct. Given the opportunities for collusion, and the differing incentives that motivate joint

venture systems and individual members, it is simply not appropriate to treat ventures as single firms. At the same time, however, courts have often gone too far -- as, for example, when they treat a productive joint venture as nothing more than a cartel, n148 Nevertheless, a joint venture is not a firm and it would be foolish for antitrust to treat them as if they were.

B. Joint Ventures as Economic Actors: Divergent Incentives

Natural persons and business firms are economic decision makers. This means that for purposes of economic analysis they are treated as single actors that maximize their own well-being, **[*54]** and their assessment of well-being is self-reflective. In the case of natural persons, maximization refers to utility; in the case of firms, it refers to profits. For example, the profit-maximization model of the firm generally does not take into account that the firm's managers or other decision makers have individual utility curves. Individually, these people may, among other things, prefer to work less, have larger retirement funds, bigger salaries, more fellow employees doing the same job, or whatever. But we generally trust that the firm's need to maximize its profits overcomes all these potentially conflicting individual preferences. For example, neoclassical price theory regards the firm as a profit-maximizing entity and does not give any special consideration to the conflicting preferences of its managers or other employees, n149

The most important difference between joint ventures and firms is that joint ventures are aggregations of economic actors; they are not economic actors themselves. Further, the structure and nature of joint ventures is such that they can often make decisions in ways that do not maximize the profits of the venture as a whole.

We assume that firms make decisions reasonably calculated to maximize their own profits. If the profit maximizing decision for the individual firm is also profit-maximizing for the venture in which the firm participates, then there is no conflict and we can expect that the firm will execute the profit-maximizing decision. In cases of conflict, however, both the firm and the venture may not be able to maximize profits, and the firm can be expected to choose the course of action that maximizes its own profits rather than those of the venture.

In this respect, the closest analogy to the joint venture is the cartel. A cartel is a group of firms that hope to increase their individual profits by reducing output and raising price to the same level that a single-firm monopolist would charge. But cartels, particularly large ones, are often thought to be inherently unstable because the price and output decision that is profit-maximizing for the cartel as a whole is not the same as the decision that is profit-maximizing for any individual member. Each member individually could earn more by producing **[*55]** more than its cartel allocation and selling at least some of its output at a lower price, n150

The analogy between cartels and joint ventures is imperfect, however, because in a bona fide joint venture (that is, one that is not simply a front for a cartel) decisions must be made about many things other than price and output. For example, someone must decide which fn-ms may join the venture. The entry of a particularly efficient new member might increase the output of the venture as a whole, and in the process reduce its costs substantially; however, the same entrant might threaten to wrest market share in the joint venture product from existing members. This choice creates a conflict between the "venture," regarded as an entity, and at least some of its members.

In this case it is quite possible that (1) the venture as a whole would experience higher per unit profits, higher output, or both, if the new member joined, but (2) every existing member would be worse off. This would happen if the venture as a whole becomes more efficient but all the gains accrue to the new member.

For example, the VISA/Dean Witter case is an antitrust dispute that arose when Dean Witter, the owner of Discover Card, was denied its request to join the VISA joint venture, n151 VISA was a "network" style joint venture of approximately 6000 members with an elected rule-making board, n152 Each member bank issued its own VISA card and set its own customer terms, such as interest rate, grace period, and annual fee. Further, each member bank could decide how many cards it wished to issue, n153

Dean Witter's Discover Card, like VISA cards, are general purpose charge cards. Unlike VISA, however, Discover is a proprietary card issued and managed by a single firm. Had Dean Witter joined the VISA venture, it would have been able **[*56]** to offer a Discover/VISA package, as well as low fees, that would be attractive to many customers. Further, because the cards appeal to different groups of consumers, joint marketing would have enabled Dean Witter to expand its customer base.

In addition, Dean Witter could use parts of the same financial infrastructure to support both cards, thus creating multicard economies of scale or scope. System wide, the likely impact of the venture would be more VISA cardholders and a greater volume of VISA transactions after Dean Witter's entry than before; so the entry would be presumptively efficient, n154 At the same time, however, the VISA/Discover package might threaten the market position of existing VISA card issuers who were not in a position to offer an equivalent package. The existing

members of the venture passed a bylaw forbidding issuers of competing cards to join VISA. n155 Financial institutions that issued MasterCard were also permitted to issue a VISA card, however, as a result of an exception that had been grandparented in. n156 As a result, the vast majority of the institutions issued both a VISA and a MasterCard -- a practice referred to in the industry as "duality." n157

Why would VISA members be willing to accept competing MasterCard members as VISA members, but not competing Discover Card members? Principally because any efficiency gains that resulted from enlarging the VISA base to include MasterCard accrued to everyone who issued both cards, which was virtually everybody in the venture. Further, to the extent the ability to offer a VISA/MasterCard package was attractive **[*57]** to customers and enlarged the venture's output, anyone who issued both cards would realize the gains from this enlarged output. Any bank who wished could issue both cards and thus profit from any efficiencies that VISA/MasterCard duality produced.

By contrast, although Dean Witter's entry into Visa would expand the Visa base as well as lower its costs, net gains would accrue mainly to Dean Witter; existing members would experience mainly a reduced market share. In this case, Dean Witter promised to be an aggressive VISA marketer, with attractive terms for card holders, n158 In addition, Dean Witter would be able to market a proprietary card (Discover) and a network card (VISA) as a package, just as many banks market VISA and MasterCard, both network cards, jointly.

To the extent that the VISA/Discover package was more attractive to consumers, the base of VISA customers would increase. Although the gains to VISA's profits and output as a whole may have been substantial, all of these gains would go, however, to Dean Witter, as only Dean

Witter issued Discover. Further, customers who wished to have a VISA and a Discover in a package would presumably drop their existing VISA card relationship and switch to Dean Witter's package offering.

In sum, then, entry of Dean Witter into the Visa venture was output expanding and presumably efficient, considering the position of the venture as a profit-making entity. Dean Witter's entry would expand not only the credit market as a whole, but also the market for VISA card holders and transactions. However, the gains from this expansion would go to Dean Witter, and its entry threatened the market shares of current Visa members.

One problem is that no one in such a case takes the viewpoint of the Visa venture, because Visa's individual members, **[*58]** rather than Visa, are the relevant economic decision makers. As a result, Visa suffers from the same incentives problem that cartels do: divergence between the interests of the relevant decision makers (individual firms) and of the cartel as a whole.

If a single firm had been facing Visa's choice, it would not have been concerned that part of the gains from the new product would come at the expense of some existing product. When a firm considers whether to add an additional product, it looks at net gains or losses. It generally matters little that the new product will steal sales from the old product if net profits are higher.

For example, suppose that a venture currently has four members each earning profits of ten, and total venture profits are forty. The venture now has an opportunity to admit a new, particularly innovative member, promising that venture profits will rise to fifty-five. However, twenty of these profits will go to the new member while a little less than nine will go to each of the four existing members. A

single firm faced with an analogous choice (in the form of a proposed merger with another firm or the proposed addition of a new product) would have little difficulty in deciding to proceed with the merger or product addition. It has one set of stockholders, and they would prefer profits of fifty-five to profits of forty; they are generally indifferent as to which division or plant is earning them.

But the joint venture is not a single economic actor with respect to this decision. When existing members vote, they will approve the alternative that keeps their own individual profits as high as possible. If the joint venture as a unit lacks market power, the simple failure to maximize is not ordinarily an antitrust concern, n159 The venture might injure itself: its output reduction will reduce its own market share. However, marketwide output will not be reduced and consumers will not be injured.

But if the venture dominates a market or otherwise wields substantial market power, then we cannot be so sanguine. In that case antitrust policy must deal with two different possibilities: that the venture acting as a unit may maximize its own profits at the expense of consumers; or that the venture may act in ways that are anticompetitive and not in the best interest [*59] of the venture as a whole, but that are in the interests of sufficient members to control decision making. With respect to the latter, it is always relevant that the venture is composed of individual participants who maximize their own (not the venture's) profits.

C. Why do Joint Ventures Fail to Maximize?

Joint ventures fail to maximize for two reasons. First, a combination of high transaction costs and self-interested voting creates a divergence of incentives between individual members and the joint venture as a whole. Second, not

everyone whose wealth is affected by the outcome is permitted to participate in the process of member or product selection.

On the first point, each firm in a joint venture makes choices calculated to maximize its own profits. If internal transaction costs were zero, the correlation between individual profit-maximizing choices and the outcome that maximized the profits of the venture as a whole would be perfect, n160 To take Allied Tube n161 as an example, the introduction of plastic conduit is efficient if the net gains that accrue to its manufacturer are greater than the net losses that accrue to the makers of steel conduit. In a world free of transaction costs, Indian Head would be able to make a transfer payment to the makers of steel conduit sufficiently large to induce the latter to drop their opposition to plastic conduit. Just as a single firm would produce both steel and plastic to the extent market of demand, so would the perfectly functioning joint venture.

But in a world of costly transactions this payment would not be likely to occur. Further, a regime requiring such payments would itself act as a significant deterrent to research. If Indian **[*60]** Head knew ex ante that it could market its newly innovated plastic conduit only by sharing the profits with noninnovators, it would innovate much less. In order to mimic firm behavior, the joint venture would have to reduce transaction costs to a negligible level and solve this incentives problem.

As long as transaction costs are high, the profit-maximizing strategy for the makers of steel conduit is to exclude the plastic and protect their own profits. This yields the unfortunate result that the venture becomes opposed to innovation o-substantially more opposed than a single firm facing the same choices would be.

The most obvious problem respecting innovation by venture members, as in Allied Tube, is that the innovator is often in the voting minority, n162 When joint venture members vote their own individual profits, rather than considering venture wide profits, they necessarily consider the fact that the profits from the individually undertaken innovation accrue to the innovator, not to the venture as a whole. As a result, they will vote for outcomes that fail to maximize venture-wide gains, n163

The second important reason that joint ventures fail to maximize is that excluded firms are unable to participate in the decision making process. For example, the entry of Dean **['61]** Witter's Discover Card is calculated to increase the output of the Visa venture as a whole and make it more profitable. The incremental profits do not accrue to existing members. Instead they all go to Dean Witter, the prospective member. Consequently, existing members can be expected to oppose the entry, and of course only existing members are permitted to participate in the membership selection process, n164

In sum, the structure and decision making process of joint ventures is such that one cannot realistically expect that joint ventures will make decisions that maximize the output of the venture as a whole. Ordinarily, a firm does not violate the antitrust laws simply by failing to maximize. However, the joint venture's failure to maximize has its own antitrust significance. First, we are willing to accept some of the anticompetitive risks attending joint ventures only because they promise greater efficiency. Second, agreements among competitors that achieve less than the competitive marketwide output are a classic concern of the antitrust laws. For a single firm to produce less than the optimal amount is one thing; for a group of competitors dominating a market to agree with each other to produce less than the optimal amount is quite another.

D. Firms, Franchises and Joint Ventures

One way to study the incentive structures in joint ventures is to compare them with two alternative types of organizations: **[*62]** firms and franchises. Consider as an example General Motors, which in the real world is a very large firm in which one parent company owns many subsidiaries. Assume that the subsidiaries are Chevrolet, Oldsmobile, Pontiac, and Buick, and that each subsidiary is involved in the design, manufacture and sale of its own models of automobiles. The subsidiaries share considerable know-how and their automobiles have in common many basic design features. Further, they engage in some joint marketing and considerable joint acquisition of inputs. But each firm designs and produces its own distinctive designs, generally sells through its own dealerships, and attempts, to distinguish its own offerings from those of other GM subsidiaries. Because this union of subsidiaries is a single firm, important decisions having to do with the welfare of GM as a whole are made by GM itself through its Board of Directors, CEO and other managers.

Now suppose that the Buick subsidiary develops a unique design feature that makes its cars far more attractive in the eyes of consumers. For some reason, this new feature cannot readily be shared with or copied by the other subsidiaries; thus Buick's popularity increases at the expense of two groups of rivals. First, Buick steals sales from Ford/Lincoln, Chrysler and other automobile manufacturers, and these sales increase GM's total sales. Second, however, Buick's new feature steals sales from Chevrolet, Oldsmobile, and Pontiac. From GM's perspective, this second transfer is nothing more than a shift in sales from one division to another. These transfers may actually harm the managers of Chevrolet, Oldsmobile or Pontiac, whose compensation, chances for promotion, or job security depend on the production of their individual units. But of

course one of the purposes of creating a subsidiary system in the first place is so that intrafirm inter-subsidiary competition provides a stimulus to increased innovation and sales.

Suppose that before this innovation each of the four subsidiaries was selling 100 cars per day, or a total of 400. After the innovation Chevrolet, Oldsmobile and Pontiac each sell 95 cars per day but Buick sells 125, for a total of 410. GM profits by promoting the innovation.

A well designed franchise system would create the same set of incentives as exist within the firm. n165 If GM were a franchise, [*63] GM would be the franchise, selling its intellectual property and perhaps certain design features and marketing strategies. Chevrolet, Buick, Oldsmobile and Pontiac would all be franchisees, each operating as an individual profit-maximizing entity to be sure, but each operating under a contract with its parent company that has many of the attributes of the parentsubsidiary relationship. Indeed, a properly designed and detailed contract could virtually replicate the parent-subsidiary system, except that the contract would substitute for outfight ownership as the source of GM's control of the franchisees, n166

Once again, the franchisor would want a system that permitted each franchisee to innovate as much as possible, even if the consequence of innovating was to transfer some sales from other franchisees. For the franchisor, the relevant question is whether overall sales increase or decrease. For example, suppose that one McDonald's restaurant in a city was able to take advantage of its unique location adjacent a city park to come up with a highly attractive entertainment/food package for children. The package would steal sales from rivals such as Wendy's and Hardees, but it would also steal sales from other McDonald's franchisees in the same city who, lacking the locational

advantage, would be unable to duplicate the offer. The franchisor, if it has the power, would approve the new offering notwithstanding the possible objections of other franchisees, in order for overall sales to increase.

In this respect, joint ventures differ from both firms and franchises. In firms and franchise arrangements important decisions are made by the parent or the franchisor, whose wellbeing is identical with that of the firm or the franchise system as a whole. GM profits when total sales of GM cars increase, even though sales of one particular subsidiary may decline. McDonald's profits when total sales at all McDonald's restaurants are maximized, even though some individual McDonald's restaurants may suffer. The distribution of sales among subsidiaries or individual franchisees may of course be important for other reasons, but as a general proposition the system as a **[*64]** whole is best off when total sales are maximized, without regard to distribution.

In the joint venture, nothing acts as an effective surrogate for the upstream party (the parent, in the case of the large firm; or the franchisor, in the case of the franchise arrangement). In the GM "joint venture" perhaps Chevrolet, Buick, Oldsmobile and Pontiac would each cast a vote on the question whether Buick can deploy its new innovation. If Chevrolet, Oldsmobile and Pontiac are each profit-maximizers, and each predicts that its own sales will decline as a result of the innovation, they will very likely vote negatively, notwithstanding that the venture's overall sales would increase. Further, if the other McDonald's restaurants in town could vote on whether one of them should promote its unique package, the vote, once again, will very likely be "no," notwithstanding that total sales of McDonald restaurants would have gone up had they voted affirmatively, n167

None of this suggests that joint ventures of competitors should be treated with hostility or that they should be discouraged as a general matter. However, it does suggest that joint ventures do not operate the same way that single firms operate. Indeed, they do not even behave as franchises do. As a result, antitrust policy should not treat them as single firms.

E. The Nature of Joint Venture Exclusion

To summarize the preceding argument: first, the individual members of joint ventures often have incentives that diverge from those of the venture as a whole, if we were to consider the venture itself as an economic actor. This fact, in addition to the ordinary concerns about collusion, serves to distinguish joint ventures from single firms and justifies antitrust's closer scrutiny. The absence of any vertically related "control" also [*65] serves to distinguish the joint venture from the franchise arrangement.

Second, although antitrust policy should be hospitable to joint ventures because joint ventures can reduce costs or improve products, thus increasing marketwide output, the incentives problem affecting individual members of the joint venture is such that joint ventures can sometimes reduce output as well. This happens when the venture's decision makers have individual market share or sales goals that conflict with the "system" goal of maximizing venture output.

Third, antitrust is also hospitable toward joint ventures because they can add a dynamic element to competition by innovating new products or processes. However, the very same ventures may be able to restrain dynamic competition. One of the reasons why joint ventures exclude certain firms-ms is to restrain the development of

product alternatives that would benefit consumers and expand the venture as a whole but injure existing members (or at least a decisive subset of them).

Joint ventures can accomplish these anticompetitive results either by excluding potential members (or dismissing existing members) or by excluding certain products. Competitive concerns are roughly similar. Indeed, often the exclusion of members is nothing more than a device for either keeping a particular product variation off the market or limiting its output. In other words, the exclusion or dismissal of particular firms from the joint venture is sometimes a means to exclude a product that these firms produce or persist in offering.

1. Product Exclusion

Product exclusion occurs when a venture disapproves a particular product, or decides not to permit the product to be produced within the venture. Most instances of product exclusion are probably competitive and in the best interests of consumers. For example, joint ventures engaged in product testing or standard setting may disapprove a product because it does not meet certain performance or safety standards, n168 A joint venture engaged [*66] in product testing or approval would probably not be doing its job if it approved every single offering a member proposed.

Product exclusion, however, is anticompetitive when its purpose or effect is to keep a product or process off the market that consumers would prefer, or that is cheaper to produce, but whose introduction would threaten the profits of firms making rival products. Consider the previously given example of Allied Tube. n169 Both the makers of steel conduit and Indian Head, the maker of plastic conduit, are members of the venture, an association that drafts model

electrical codes. The steel conduit makers conspire to exclude plastic conduit from a sizeable portion of the market by having it disapproved for use in new construction in the model code.

The profitability of this strategy does not depend on collusion, oligopoly, or even on jointly held market power by the steel conduit makers. Even if they are behaving competitively, the steel makers stand to gain by excluding or limiting the growth of a new product that is likely to displace or at least steal a sizeable market share from steel conduit. First, the steel conduit makers have made a large investment in their technology and the plant capacity for manufacturing conduit. Plastic conduit threatens to reduce the demand for steel conduit significantly, and this will give the steel conduit makers excess capacity and probably higher costs, n170 Some of the firms will find the production of steel conduit unprofitable and they will either go bankrupt or close down their conduit divisions. In a world of perfectly mobile resources, with production immediately transferable from one market to another, perhaps a firm would be indifferent to loss of output of a competitively priced product. But in a world where fixed-cost investments are specialized and previously committed, loss of sales can entail large business losses in the short run even though the current returns are only competitive, n171 **[*67]**

At the system level, the market power question must be approached differently. There, Indian Head's injury would result only if the venture had some power to exclude or limit growth in the market overall. For example, if the venture promulgated an electric code, but only a tiny percentage of state and local governments paid any attention to it, then Indian Head's injury would not be substantial. Likewise, if ten different organizations produced such codes and governments chose among them depending on which they thought was most realistic, the

Indian Head might not be injured at all. The effect of the exclusion of a superior product from one particular code would simply be that governments would opt for a different code.

In sum, some kind of market power (or the ability to foreclose from the market or to limit a rival's output or expansion) is generally a predicate to anticompetitive exclusion at the system level. However, at the member level, exclusion can occur and reduce consumer welfare even if the members are numerous and behaving competitively vis-a-vis each other.

Concerning the Allied Tube decision, had there been no venture whatsoever, a competitive market would have produced both the steel and the plastic conduit. Indeed, if plastic conduit was as revolutionary as suggested, plastic may eventually have destroyed the market for steel conduit, just as electronic calculators largely destroyed the business of slide rule manufacturers. The impact of the joint venture's anti-plastic decision was to restrain, rather than further, the development of a new product.

The Insurance decision represents a special case of joint provision and product exclusion, n172 Insurance Services Office, Inc. ("ISO"), is a joint venture that serves various needs of the insurance industry, and includes as members approximately 1400 property and casualty insurers. Although ISO performs many functions, two of them are relevant here. First, ISO develops standardized forms for home owners insurance, automobile insurance, and the like. Second, ISO collects data on risk from its numerous members, merges and analyzes the data, and distributes the results back to the members, n173 Both of **[*68]** these functions are valuable to the industry as a whole, benefit consumers, and fully justify the existence of an elaborate joint venture mechanism. The development of

common forms permits customers to compare, in effect, apples with apples when they purchase insurance. Insurance is a market where the product being sold -- risk -- can be contrived in an infinite number of ways and with any possible variation of inclusions, exclusions, exceptions or qualifications. Further, few customers can make realistic assessments of the risk or expected cost of any particular casualty. The result could be a hopeless array of product offerings and unlimited confusion for consumers. Forms development, a principal activity of ISO, is nothing more than a kind of product standardization. It insures customers that the coverage being offered by one firm is identical to that being offered by another firm, or that the differences in coverage are readily identifiable and highlighted for the customer's attention. This system permits consumers to shop price rather than numerous idiosyncratic differences in coverage. In sum, ISO rationalizes and brings into manageable limits the array of product offerings that the insurance industry is capable of putting out.

Collection and analysis of risk data are equally important because insurers' premiums are based on risk. The better the data, the more accurately that risk can be calculated. Since insurers themselves are as risk averse as any business firms, if they are unsure about the level of risk they will calculate a margin of error into their premiums. In sum, insurance rates are probably lower when the extent and quality of risk information is accurate rather than when it is inaccurate; once again, consumers benefit.

The allegations in the Insurance case were as follows, first, ISO was controlled by a relatively small number of very large insurers; second, these insurers no longer wished to insure against certain kinds of losses where the payout potential was very large -- namely, losses caused by groundwater or land pollution resulting from improper disposal of hazardous materials; and third, these insurers

wished to cover certain losses only if they occurred during the time period that insurance was in effect, n174 At the same time, however, this small group of **[*69]** insurers could not effectively eliminate the broader forms of coverage from the market unless numerous small insurers could be forced to agree. If the larger insurers simply agreed with each other to drop this coverage, customers who wished to have it would simply switch insurers. To prevent this from happening the larger insurers did two things. First, they instructed ISO to develop new forms that provided for the reduced coverage. But second, they instructed ISO to stop collecting risk data on the older, broader coverage forms, n175 Lacking complete, accurate and up-to-date actuarial data, the smaller insurers could not price the older, broader forms of coverage competitively.

The allegations in the Insurance case undermine any notion that there was no difference between unilateral and concerted action within the venture. It would almost never be anticompetitive for a single-firm monopolist to refrain from offering a particular product; but it can become so for the joint venture that restricts output by decreasing the quality/variety of its offerings -- particularly when membership in the venture gives firms a significant advantage over non-members.

Likewise, the dominant insurers were using the joint venture in a way that served their own ends, but probably not those of the insurance industry as a whole, and certainly not those of consumers. Suppose that insurance was sold by a very large monopolist which had two classes of customers. One class was willing to pay for the broader insurance coverage while the other was not. The monopolist would very likely offer both alternatives. It would almost certainly charge a higher premium for the broader coverage. It might engage in price discrimination -- that is, it might charge a premium for broader coverage that was higher in

proportion to cost than the premium for the lesser coverage. The monopolist would probably not drop the higher form of coverage unless the incremental cost of supplying it was greater than the incremental revenues it produced.

The ISO joint venture, however, differed in that the interest of individual insurers was not precisely the same as that of the insurance industry as a whole. Each member had its own expertise and its own investment in the development of its product. **[*70]** Each member competed with other members for the sale of insurance. Depending on size, information, and manager personality, each may have been willing to assume different levels of risk. Importantly, both the purely competitive market (that is, without any joint venture at all) and the monopolized market would probably have produced the sale of both classes of insurance. But the joint venture market did not because one set of insurers were able to control the venture for their own benefit rather than for those of the industry as a whole.

2. Member Exclusion

Member exclusion, as in the Terminal Railroad, n176 Associated Press, n177 or VISA n178 cases, occurs when the existing membership of a venture votes to exclude a new applicant, or perhaps when it kicks out someone who was already a member, n179 The motives for member exclusion are as manifold as those for product exclusion. First, member exclusion may simply be a way of disciplining firms that have been found to be producing substandard products or engaging in unethical business practices. Second, member exclusion may be a device for controlling free riding. In closed membership joint ventures, forcing entry by latecomers would encourage everyone to refrain from investing in the venture during its early, high risk period because everyone would have a right to join later when the risks have been overcome, and thus avoid

investment in a venture that might fail. Third, member exclusion may be a way of facilitating collusion or collusion-like behavior among members of the existing ventures. If the venture gives existing members access to lower costs or some essential input, they can effectively impose higher costs on rivals by keeping them out. This protects the profits of existing members. Even if the new applicant would likely agree to participate, monopoly profits to individual members would decline as the number of members increased, n180 ['71] If the new member threatened to undercut existing prices, member profits would be reduced with or without a cartel. Fourth, member exclusion is often simply a way of achieving product exclusion. In the VISA case, for example, the effect of the exclusion was to prevent the introduction of Dean Witter's VISA/Discover Card package, and existing Visa members from issuing proprietary cards of their own -- but this product exclusion was accomplished simply by excluding Dean Witter from the Visa joint venture altogether, nl 81

When challenged as anticompetitive, the varied nature of member exclusion entails different mechanisms for assessing power. For example, if the excluded plaintiff alleges that the exclusion was designed to facilitate collusion by the individual members of the venture, then it must be shown that the individual members have some realistic capacity to collude. By contrast, if member exclusion is nothing more than disguised product exclusion, then ability to collude at the member level is not important, n182

3. The Extent of Exclusion

In private plaintiff joint venture exclusion cases the plaintiff is nearly always inside the relevant market. If it were not, it would probably lack standing to sue. n183 As a result, "exclusion" refers to exclusion from the venture, but not necessarily to exclusion from the market altogether. The

impact of the decision to exclude may be to drive the plaintiff out of the market altogether, but anticompetitive results hardly require that. Both product exclusion and member exclusion can be anticompetitive even if the excluded firm continues to sell its product. Anticompetitive exclusion is profitable if the venturers succeed simply in limiting the growth of the threatening product or the [*72] aggressive firm applying for membership. For example, in the VISA case the Tenth Circuit apparently thought that since the plaintiff already issued a general purpose charge card, it could not be anticompetitive for the defendant to exclude the plaintiff from its venture, n184 To be sure, the venturers might profit even more if they could shut down Discover altogether, but any rule that made it more difficult for the plaintiff to take away their individual customers would protect their own market shares while harming consumers. Likewise, in the case of product exclusion, it might have been even more profitable for Allied Tube to destroy the market for plastic conduit completely, n185 The profit to the individual venturers comes from protection of their market share. But a second best outcome was one that simply cut the plaintiffs plastic conduit out of certain parts of the market.

V. Significance, Nature and Measurement of Market Power

A. Supreme Court Power Requirements in Joint Venture Cases

Market power must be assessed in all antitrust cases that are decided under the rule of reason. Measuring market power is a highly inexact and expensive science, however, n186 Further, not all market power queries are equally detailed. Sometimes a cursory review of the facts is all that is necessary to establish that the defendants lack any market power at all; occasionally such quick looks even establish

substantial market power. But in the middle range market power inquiries can quickly become elaborate and expensive. **[*73]**

The extent of the market power query varies both with the offense and the nature of the alleged offender. For example, the presumption in favor of a single business firm's unilateral actions is strong, and most unilateral acts challenged by competitors are efficient. As a result, the law of monopolization requires a fairly thorough inquiry into market structure and the ability of the defendant to exercise market power, n187 Indeed, even within the law of monopolization the extensiveness of the market power query varies. For example, predatory pricing is a rational strategy only for a firm that has a reasonable expectation of a very prolonged period of monopoly pricing once the predation succeeds. As a result, the inquiry into entry barriers and, height and duration of the monopoly price increase is much more elaborate in predatory pricing queries than it is in monopolization claims generally, n188

In contrast to unilateral actions, joint ventures and other joint conduct provide greater opportunities for anticompetitive behavior. Unlike predation, which may be an expensive investment taking many years, joint ventures can be formed as quickly as cartels can, and they can be quickly abandoned if they do not work out as planned. The opportunity to earn monopoly profits for just a few months or a year may be a sufficient motive to form a joint venture facilitating collusion. In general, the more cheaply and quickly market power can be created, the less that is needed for profitability. For example, if the costs (including risk of capture) of forming a cartel are zero, then the cartel is profitable even if it makes only one sale at a price above the competitive level.

In this respect, a joint venture differs somewhat from a cartel. The costs of engaging in any joint activity must include the cost of investments that will be lost if the joint activity fails. For cartels, this loss may be extremely small, disregarding the risks of capture and prosecution. For example, the cartel members may do no more than meet in a room and agree to reduce output and raise price. In a joint venture, by contrast, firms may make more substantial investments in the venture. These **[*74]** investments are less than they would be for a single firm, but they can be significant nonetheless. For example, the firms may reconfigure a product, build joint research or production facilities, or engage in joint promotion.

For a collusion-facilitating joint venture to be profitable, the gains from collusion and any efficiencies that the joint venture produces must be large enough to compensate for these investments. Often, this means that a collusion-facilitating efficient joint venture is more likely to be formed than a collusion-facilitating inefficient venture or a venture that does not facilitate collusion. For example, if the venture requires a $100 investment but produces only $70 in cost savings, firms would not find it attractive unless it produced an additional $30 in gains from collusion. But the same venture would be attractive if it produced $100 in cost savings, and from that point any additional gains from collusion would be profitable provided they covered their incremental costs. Since the venture often "sets the stage," so to speak, for collusion, the incremental cost of price fixing, market division, or equivalent collusive activity is often very small. If the costs of forming a joint venture are just equal to efficiency gains, then collusion will be profitable if any incremental gains are available.

For the joint venture the question of the relevant cost and degree of incentives is not the cost of the venture itself, which could be substantial, but rather the incremental cost

of the venture members' engaging in collusion. Joint ventures create opportunities for the short-term, inexpensive exercise of market power that make them more closely akin to cartels than to single firms. Indeed, the existence of the venture may reduce the costs of collusion by giving members ample opportunity to communicate, standardize products or sales terms, or do other things that make collusion less costly. As a result, the market power inquiry in joint activity cases need not be as elaborate as in monopolization cases.

Supreme Court decisions have generally recognized this. In Indiana Dentists, for example, the Supreme Court purported to apply the rule of reason because the defendants were members of a learned profession, and because "the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." n189 However, the **[*75]** Court was sufficiently suspicious about the defendants' horizontal agreement to withhold x-ray data from an insurer that it truncated the market power inquiry to almost nothing at all. The Court reasoned that an agreement among dentists to withhold from their customers a service that the customers want (forwarding x-rays to insurers so that they can verify claims) was identical in effect to a price-fixing conspiracy, n190 Since price-fixing conspiracies are illegal without any market power inquiry, this "rule of reason" inquiry into power need go no further, n191

In contrast, the market power inquiry in NCAA n192 turned out to be more detailed, although not nearly as elaborate as it would have been in a monopolization case. The NCAA rule at issue limited the number of times each participating college could have its football games televised. First, the court found that this was a "naked restriction on price or output," even though it was in the context of a joint

venture, n193 Such a restraint "requires some competitive justification even in the absence of a detailed market analysis." n194 However, then the Court noted with approval the district court's determination that there was a distinct relevant market for college football broadcasts, n195 since advertisers were willing to pay a premium price to reach the audiences that watch college football games.

As NCAA illustrates, the process of rule making within the joint venture set the stage for collusion and even disguised it. We would be immediately more suspicious about an agreement between, say, the NFL, whose members play professional football, and the NCAA, whose members play amateur collegiate **[*76]** football, to reduce the number of televised games. Assuming no other integration of production, that agreement would be a naked cartel. But once the output reduction agreement is placed within the joint venture itself, as in NCAA, its status becomes more ambiguous. The incremental gains from potential collusion are just as present as before, but the risks and other costs involved have declined. Indeed, at the time the output restriction rule was formulated, those involved apparently thought it was legal. The rule itself was explicit in the NCAA agreement and publicly known to anyone who wished to inquire.

In sum, the scope of the market power inquiry must dwell on the potential for incremental gains from collusion. If the venture created no economies whatsoever but promised only gains from collusion, then high formation costs would make its formation less likely. But if the venture produces economies sufficient to justify the costs of its formation and the incremental costs of colluding are small, then small incremental gains would be sufficient to produce collusion as well.

In Northwest Wholesale Stationers n196 the Supreme Court held that the rule of reason governed a concerted exclusion claim arising out of a joint buying venture's unexplained expulsion of the plaintiff. Notwithstanding the venture's lack of explanation for the expulsion or its failure to give the plaintiff notice and an opportunity to be heard, the court declined to place this concerted refusal in the per se class. Rather, it concluded that per se treatment should be reserved for "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" n197 Further, what was common to cases condemning these practices is that they "were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." n198 The Court then noted that wholesale purchasing cooperatives such as the defendant were not "characteristically likely to result in [*77] predominantly anticompetitive effects." Rather, they were likely to be efficient, n199 Of course, the plaintiff was not objecting to the venture as a whole, but rather to the decision to exclude him. However, the Court appeared to say that once the venture as a whole seemed presumptively efficient, an ambiguous exclusion would not be automatically placed into the per se class. Rather, illegality would require some kind of showing of "market power or exclusive access to an element essential to effective competition .... " n200 Since the plaintiff had proceeded entirely on a per se theory and had made no allegations of power, dismissal was warranted.

This conclusion, although correct, said nothing about the extent of any query into power. To be sure, a buying cooperative able to reduce member costs is presumptively efficient, and in a broad range of exclusion cases this should entitle the venture to rule of reason treatment. But the

venture might be able to earn even more by fixing resale prices, and the plaintiff may have been a price-cutting cartel cheater. Certainly, an effective way for a cartel to control a cheater is by cutting off its low cost source of supply.

Northwest Stationers certainly should not be read for the proposition that every challenge to a naked restraint, or even every challenge to a concerted refusal to deal, requires a market power inquiry, n201 Rather, in cases of ambiguity about whether the per se rule or the rule of reason should apply, quick looks at a joint venture's market power can guide the inquiry. If the exercise of market power seems impossible, then in ambiguous cases doubts should be resolved in favor of rule of reason analysis and probable dismissal of the complaint. Further, explicit price increasing or output reducing agreements are dealt with more harshly than concerted refusals to deal -perhaps because the latter are viewed mainly as ambiguous facilitators of the former. Thus, Trial Lawyers n202 was not a **[*78]** very ambiguous case because the boycott challenged there was a simple concerted request for higher pay. No claim was even raised that the Superior Court Trial Lawyers Association in any way integrated the activities of the individual attorneys who represented indigent criminal defendants.

If the joint venture integrates production or distribution, then agreements to restrict output or raise prices are still illegal per se unless the defendants can show that the challenged agreement is essential to the functioning of the venture. In the latter case, a rule of reason inquiry is necessary, and the plaintiff will have to show market power. If the challenged restraint is a concerted refusal to deal, the rule of reason will ordinarily be applied unless it is fairly obvious that the concerted refusal is nothing more than a collusion facilitator. As the Supreme Court noted in NCAA, even an elaborate joint venture can incorporate a "naked" restraint, n203 This means that a restraint does not qualify

for elaborate market power analysis simply because it is printed in a joint venture agreement, n204

Thus in most cases involving exclusion from joint ventures that are conceded to be efficient, the rule of reason applies and some showing of power is essential. The one exception occurs when the concerted refusal is itself "naked" -- that is, not even arguably required for the joint venture to achieve its potential. For example, if a joint venture engaged in fixing prices and expelled any member who sold for less, an elaborate market power inquiry hardly seems necessary. n205

Finally, although market power is required, it is not sufficient for a finding of illegality. The Broadcast Music decision illustrates that even substantial market power does not entail illegality. In that case the Supreme Court found a blanket licensing arrangement covering performance rights to be legal, even though it literally involved price-fixing. The clear effect of the agreement was to enlarge rather than limit output, n206 Under **[*79]** the arrangement, owners of performance rights to recordings issued non-exclusive licenses to the defendant, who in turn sold blanket licenses to various licensees such as television and radio stations at prices that varied with the licensee's advertising revenues. Since the blanket license covered all artists, all essentially had to agree to a given royalty rate for each performance of their works. Although the Supreme Court did not discuss power, power can be inferred readily from the venture's market share, as well as the fact that it was able to price discriminate by charging rates in proportion to the buyer's revenues, n207

As Broadcast Music illustrates, ventures that reduce costs substantially can also create substantial market power, particularly if they occupy large portions of a properly defined relevant market. Market power is the ability to

maximize one's profits at a price higher than cost. One can create it either by increasing the price or reducing the cost. Nevertheless, our fears in the Broadcast Music case are alleviated by two facts: any performance right holder who wished was entitled to participate in the venture and the venture itself was non-exclusive. In other words, any participant was free to make as many sales outside of the arrangement as it pleased. As long as the venture admitted everyone who wished to join, and as long as each member was permitted to make unlimited non-venture sales, the nonventure market would always act as a check on the market power of the venture. It could never charge more than the price that had prevailed before the venture came into existence.

B. Nature of the Power Inquiry: Power Over Price or Power to Exclude

Economically, market power is a firm's ability to profit by raising price above marginal cost. The Lerner Index expresses this conception as the degree of difference between a firm's marginal cost and its current, or profit-maximizing, price, n208 **['80]**

But this measure ignores essential questions concerning the time period over which market power is exercised. For example, it avoids inquiry into changes in demand or product design, and the impact that these changes may have on a firm's market position. Further, the economic definition of market power is so tied to the short run that it says little about the firm's power to exclude rivals over time. This question is especially relevant when the practice being challenged is express joint venture exclusion.

1. The Importance of Time in Power Analysis of Joint Ventures

Measures of market power are quite meaningless unless some estimate of duration can be attached to them. n209 The firm capable of operating for a day at the monopoly price before its sales are completely stolen by competitors has market power on day one but not on day two. For example, the 1992 Horizontal Merger Guidelines find market power in the ability of firms to increase price "for the foreseeable future," n210 without losing sales to firms that are already inside the market within one year, n211 or without losing sales to new entrants from outside the market within two years, n212 These are policy judgments, not the results of pure theory. Some tradeoff must be made between the certain but generally unmeasurable efficiency gains that can be had from mergers, and the equally certain but unmeasurable losses that can accrue from increased market power. In the case of mergers, time periods on the order of one to two years seem sufficient. For monopolization we might require more; for cartels less.

Although the durability question is important to antitrust, judicial decisions do not often pose the question in these terms. Rather, the durability requirement becomes more or less important **['81]** depending on the nature of the offense. Consider two examples at the opposite extreme: predatory pricing and naked collusion.

The law of predatory pricing requires a particularly strong showing of the durability of market power. We express this showing through the label "recoupment:" the plaintiff in a predatory pricing case must show that after a period of cutting prices below costs the predator will be able to enjoy a period of monopoly prices in which prices are sufficiently high and the predator is sufficiently protected

from new entry or output expansion by rivals that the predation scheme is profitable, including the time value of the monies spent on the predation itself, n213 This is a particularly strong showing of durability of future market power -- indeed, it is so strong one might doubt that the showing can ever be made. n214 In cases alleging naked price fixing, by contrast, no showing of market power is necessary, and we simply presume that prices will rise from the fact that the defendants apparently think they will rise.

The different treatment is justified by the various ways in which the market power is created. Predatory pricing is an extraordinarily expensive and risky way to create market power and the conduct itself is highly ambiguous -- any price-cost test for predation is likely to generate many false positives. Given the ambiguity of the conduct and the extraordinary expenses that make it an unpromising strategy for nearly all firms, antitrust tribunals use an extremely strong market power requirement to distinguish winning claims from losing ones. n215

Price fixing is an entirely different matter. As a general proposition the investment in it need not be large. Three firm **[*82]** managers can meet over dinner or agree on prices over the telephone, with the increases to become effective the following day. Given this extremely low investment, collusion can be profitable ev6n if the market power thus created is not particularly durable. For example, if entry takes as little as six months, a cartel can earn six months of monopoly profits. Once entry occurs, the cartel members will let the price drop back to the competitive level. At that point they might invite the new entrants into the cartel and start over. Such markets may be characterized by repeated attempts at collusion, repeated "failures," and subsequent attempts. However, what is going on is not "failures" at all, but simply a series of cartels, each of which individually is of relatively short duration but nevertheless

profitable. "Failure" occurs only if the cartel falls apart before it recovers its investment, or if the participants are caught and imprisoned, fined, or assessed large treble damages awards.

Joint ventures occupy a position between predatory pricing and naked collusion. Often, however, the collusion analogy is the most apt: joint ventures can provide opportunities for collusion, and collusion within a joint venture is not necessarily any more costly than collusion outside of one. On the contrary, the existence of a joint venture and the opportunities for communication that it provides can greatly reduce the costs of organizing a cartel and agreeing about the price, n216

2. Dynamic Analysis of Power

If the venture as a whole wield's market power an exclusion decision can be anticompetitive, even though individual members of the venture are not readily able to collude.

As noted earlier, joint ventures often appear to be socially beneficial only when efficiencies are looked at in a dynamic rather than a static context, n217 The new product or process created by a venture may produce consumer benefits that far **[*83]** outweigh any short run ability that the venture might have to set prices above its marginal costs.

What is not so often appreciated is that the very same dynamic considerations that make ventures efficient can also serve to make them anticompetitive. This impairment creates a deadweight loss, or social cost, similar to the deadweight loss associated with market power -- indeed, it is captured by the second half of the Supreme Court's often cited concept that market power is the power to raise prices or to exclude competition, n218

Importantly, when market power judgments take dynamic considerations into account, power or something resembling it can be found even though (1) the firms involved have no realistic ability to fix prices and (2) their prices in fact are continuously "competitive" if one looks at short-run measures such as the relationship between price and marginal cost.

Consider once again the Allied Tube case. n219 Assume that a group of manufacturers of steel conduit lacks any realistic ability to fix prices. They are currently earning returns at or slightly above the competitive level. They have a substantial investment in their production facilities and, more generally, in their commitment to production of things made out of steel. Now a new firm comes along and offers plastic conduit. For simplicity, assume that customers are indifferent as between steel and plastic conduit but plastic costs less to produce.

If the plastic conduit maker charged a price equal to its costs, the steel conduit makers would make no sales whatsoever. Indeed, the plastic conduit maker might be able to charge more than the competitive price and still capture all sales. Depending on its own costs and those of rivals, it might also maximize profits at a higher price that permitted the steel conduit makers to make at least some sales, n220 **[*85]**

For the steel conduit manufacturers, then, the cost of accommodating plastic is either a total loss of sales or else a dramatic reduction in output. If the steel makers are behaving competitively, the result will be loss of investment and perhaps bankruptcy for marginal firms. If they are behaving oligopolistically, the result will be loss of some or all oligopoly profits, n221

Suppose the steel conduit makers succeed in keeping plastic conduit off of the market. This preserves their own output, but has "deadweight" loss effects on consumers that mimic the deadweight losses of collusion generally, n222 However, these losses must be viewed in a more dynamic context. Literally, the market for steel conduit was competitive before steel conduit was faced with the rival plastic conduit, and it continues to be competitive after the plastic is excluded. As a result, there is no "deadweight loss" at all in the traditional monopoly sense.

In sum, then, when one considers the market in movement, firms have incentives to exclude that (a) do not depend on their short-run, or present, ability to set prices at monopoly levels, and that (b) generate Social costs, or deadweight losses analogous to those caused by traditional monopoly or collusion, n223 **[*87]** However, the market may appear to be competitive, with prices equal to marginal cost, both before and after the exclusion occurs.

This does not mean, however, that traditional concerns about market power are irrelevant, for two important reasons. First, the presence of market power increases the incentives to exclude. That is to say, if the steel conduit makers in the above **[*88]** illustration were colluding, the entry of plastic could cost the steel conduit makers even more than if they had been behaving competitively.

But secondly, even though the firms do not have to have the power to raise prices above marginal cost, they may have the power to "exclude." This power is best measured, not by formulations such as the Lerner Index that focus on relationships between cost and profit-maximizing price, but rather by traditional antitrust formulations such as market share, or by determination of access to some unique or essential input.

The Lerner Index measures only the result of market power, not its source. Further, the Lerner Index is itself "static," in that it does not consider the impact on consumers of changes in relative cost or demand. By contrast, more traditional antitrust formulations identifying market power as the power to exclude look to the source of market power. Further, the exclusion formulation is able to take market change into account. For example, DuPont's patent in Cellophane gave DuPont the right to prevent others from manufacturing and selling a certain product. If that product also defined a relevant market, then it may also have given DuPont the power to charge a monopoly price, n224 Although the Court was perhaps imprecise when it defined market power in Du Pont as "the power to control prices or exclude competition," n225 it was correct to conclude that discretion over price does not tell the entire story insofar as antitrust policy is concerned.

At the same time, however, some kind of market power is essential. If the venture has neither the power to control prices nor the power to exclude, then harmful consumer consequences are more difficult to identify. In the conduit case, the relevant power inquiry concerns, not the ability of the steel conduit makers to set a price above the competitive level, but their ability to keep plastic conduit off the market.

The antitrust market power inquiry must carefully identify the relevant market in which the venture operates and then assess the market share of the overall venture. By contrast, the internal structure of the venture may not be all that important, depending on the nature of the antitrust challenge. For example, consider the insurers who try to exclude "long-tail" coverage n226 [*89] by refusing to supply statistical data. n227 If these insurers collectively dominate the market in such a fashion that collection of such data becomes unprofitable, they have succeeded. But if the non-

conspiring insurers are sufficiently numerous or large to supply the data for themselves, then the larger firms will fail and a market for the long-tail coverage will continue to exist. So consideration of market dominance at the system level is important. At the member level, however, it would not matter whether the insurance market was conducive to price fixing, or whether the insurance joint venture had five members or 100. The consumer harm from the venture's decision comes not from collusion, but from the exclusion of a product that consumers would have preferred had it been available. n228

C. Market Power Inquiry at System or Member Level?

A joint venture with 1000 members may dominate a relevant market while individual members have infinitesimally small market shares. The market may look extremely concentrated or extremely unconcentrated depending on which level one examines. Which is correct?

The answer depends entirely on the question being asked. When the challenged practice is thought to facilitate collusion or collusion-like performance but individual members retain nearly all their ability to compete, market concentration at the member level remains significant. For example, suppose 6000 plumbers in the City of Chicago form a co-operative to purchase parts at the lowest possible price and provide seminars introducing [*90] plumbers to the latest technology. Any challenge based on the theory that the venture is raising the price or reducing the output of plumbing services must evaluate the plausibility of 6000 plumbers' fixing prices simply by using a purchasing and educational venture as a facilitator. In this case, market structure at the member level would probably be decisive. By contrast, as the previous discussion illustrated, if system-level power exists then an exclusion decision can be both

profitable to existing members and harmful to consumers even though the existing members are forced to set price and output at the competitive level.

Suppose that the plumbers' cooperative (1) passed a formal rule forbidding any plumber from working more than 40 hours per week and (2) threatened expulsion of anyone who violated the rule. Setting aside for the moment the question of per se illegality for an output restriction agreement, in this case the market dominance of the venture as a whole acquires much greater significance, and the diffusion at the member level is relatively less important.

The key to the difference is the ability of the venture to enforce its position against "cheaters." In this case, one cheats by working extra hours. Assuming plumbers keep an eye on one another, someone who persistently works extra hours is likely to be caught, n229 Moreover, the threat of expulsion from the joint venture is both credible and costly. As a result, the fact that the venture contains 6000 plumbers is far less important than it was in the first case. Assuming the venture can effectively catch and discipline those who cheat by working extra hours, this output restriction agreement may be effective notwithstanding the large number of members.

"Cheating" in a joint venture can occur in two different ways. First, the cheater may cut price or produce more than the venture permits. Second, the cheater may wish to offer a product innovation or variation that the venture seeks to exclude. In response to the first, a cartel of 10,000 members can function quite well if it enacts its price-fixing agreements as binding resolutions, and then obtains the power of the state in enforcing them. For this reason judicial intervention into such things as bar-enforced minimum schedules for legal fees is appropriate, n230 **['91]** In other cases the venture may itself take the price-setting

function away from individual members. For example, under the blanket licensing arrangement in Broadcast Music, individual authors had no say in determining either the price of the license or their own participation in the royalties, n231 Price was set by the venture. In that case it did not really matter whether the venture contained 100 members or 100,000. Of course, if secret price-cutting is possible, then a venture with many members may have a more difficult time policing a cartel than a venture with few members; that is entirely a function of the nature of transactions within the market.

As to the second kind of cheating, product standardization agreements are generally easier to enforce than price fixing agreements, for several reasons. First, the redesign of a product is ordinarily a much more visible act than the negotiation of a price. Whether the steel conduit venture has ten members or 10,000, it would be impossible for one member to develop and market plastic conduit without detection. By contrast, if the venturers had agreed to charge $1 per foot for their product, it might be relatively easy for one member to negotiate a large, secret transaction at a lower price, n232 Second, for many ventures product design is a common enterprise, while price setting is individual. Indeed, the whole purpose of the venture may have been to develop a common product, or a common set of product specifications.

Both product and member exclusion can be accomplished through formal rules whose violations are readily detectable, and where enforcement is easy. To elaborate on an earlier example, suppose that the makers of electrical components have organized the Electrical Components Manufacturers' Association ("ECMA") to promote their industry. Currently the ECMA has **[*92]** 650 members, thirty-five of which manufacture steel conduit. No ECMA member makes plastic conduit. Roughly 80% of

the dollar value of electrical components in the United States is produced by ECMA members. One of the things the ECMA does is prepare model specifications for buildings, and these specifications are widely used by contractors or purchasers soliciting competitive bids for new structures. The members of the ECMA avoid all discussions of price or output. The ECMA now passes two rules. The first rule permits member firms to submit printed price lists of their components to the ECMA printing office, which are then published as an appendix to the quarterly specifications manual. The second rule provides that no new manufacturer of electrical components can join the ECMA unless it receives a vote of two thirds of a standards committee that is composed of ECMA members and that passes judgment on the quality of the applicant's components. Currently the committee is composed of twelve members, five of whom make steel conduit. Antitrust challenges are lodged against both rules.

Both rules would ordinarily be challenged under the rule of reason, since both are ancillary to a legitimate joint venture. Further, both have arguable efficiency explanations. The price list rule facilitates bid preparers in determining not only specifications but also prices. The membership rule ensures that only manufacturers of quality products can join the venture. Thus if either rule is to be condemned, the challenger must make some kind of market power showing.

The appropriate market power inquiry differs, however. The threat of posted price lists comes principally from possible collusion. In order to assess the threat one must know the market share of any particular product, such as conduit, that is controlled by the venture overall; but the internal structure of the industry is also very important. For example, if there were only three manufacturers of double-pole switches and all three submitted their price lists, the

risk of collusion would be quite substantial. By contrast, if all 650 members manufactured switch plates, the risk of collusion would have to be judged as very small, n233 In sum, then, a competitive analysis of the rule **[*93]** permitting firms to publish their price lists requires, first, a showing that the venturers in the aggregate had market power in the various products controlled by the venture. Second, it requires an analysis of the internal structure of the industry indicating the risk of collusion.

The exclusion rule would be treated differently. Suppose that the inventor and new manufacturer of plastic conduit should apply to join the venture and have its product included in the specifications manual. The committee votes seven to five to admit, thus falling short of the two-thirds requirement. All five of the steel conduit manufacturers voted against membership, while the other seven voted in favor.

Assuming the dominant position of the venture as a whole, the market power inquiry as to this question must consider (1) whether the exclusion rule facilitates collusion, and (2) whether the exclusion rule permits members committed to an established technology or way of doing business to prevent the growth of a rival and perhaps superior technology or mode of doing business. As to the first question, internal structural issues are just as relevant as they were to analysis of the price list publication rule. Cartels can certainly be facilitated by excluding rivals from market access, but collusion must be likely in the first place. If the three members of a trade association exclude a price-cutting forth from market access, our eyebrows are raised. But if an association of 35,000 dentists in a state votes to discipline one member for ethical violations unrelated to pricing, facilitation of collusion is not likely.

If our concern is not collusion but rather exclusion of competing technologies or ways of doing business, the internal market structure of the venture is much less important and may be irrelevant. For example, the makers of steel conduit in the hypothetical have a common goal: protection of their market share from the incursions of a threatening innovator. None of the cheating problems typically associated with the cartel apply. Further, enforcement of the rule is an "associational" rather than individual act. Once the anti-plastic conduit decision is [*94] made, it really does not matter whether the body that made the rule contains three manufacturers of steel conduit or 3000. The exclusion is caused by a single entity, the association, and only the association can change it. n234

In such cases, the small size of individual venture members is of no consequence, particularly if the venture has the power to enforce exclusionary rules. The Tenth Circuit failed to see this in the VISA case, n235 when it concluded that, because Visa had numerous members anticompetitive exclusion would be unlikely or even impossible, n236 In this case, however, the challenged exclusion was a formal associational rule that forbade VISA members from issuing a competing card. Because the rule was enforced at the system level and a violation was readily detected (no one could secretly issue a competing card, such as Discover or American Express), whether Visa had ten members or 10,000 members was of no consequence. Each individual Visa member would be better off in a world in which it did not have to compete with a more aggressive, lower cost rival, and the rule could easily be enforced by the association. [*95]

D. Market Share Thresholds at Network Level

In the short run, the principal advantage of a joint venture is transactional economies or economies of scale or scope. Presumably, these economies could not readily accrue to single firms in the position of the joint venturers, although they could certainly accrue to larger firms. In some "network" joint ventures such as Associated Press or VISA/MasterCard, these economies may be "global," in the sense that costs decline continuously as the output of the venture grows. However, in other network joint ventures such as NCAA or the NFL, there are certainly diseconomies resulting from large size. For example, if the NFL had 5000 members, organizing playoffs and a Superbowl would be a gargantuan undertaking. Furthermore, the quality of the players, a limited resouree, would probably decline since so many would have to be recruited.

This creates an antitrust quandary. If the market share of the VISA venture exceeded fifty percent and costs declined through the entire output range, then no similar venture could match its efficiencies. By contrast, if the NFL had a 50% share of some properly defined market, there might be room for numerous, smaller football conferences that were equally efficient.

The market power query also begins with the proposition that the joint venture is not a firm, but rather a combination of firms. As a result, market power is more readily created and brought to bear. n237 Further, even though the market may be diffuse at the member level, joint ventures create opportunities for oligopoly performance at the system level, particularly if they are not restrained by aggressive internal competition.

As a result, concerns about exercise of market power are greater than normally considered appropriate for analyzing single-firm conduct, and more akin to those that apply to mergers. Presumptively, dismissal of a rule of reason complaint seems warranted if the market has a system level HerfindahlHirschman Index ("HHI") reading of less than 1800, and the share of the market controlled by the venture is less than 25%. n238 At an HHI of 1800, the market has the equivalent of **[*96]** roughly three equal size firms or ventures, and a 25% market share leaves room for three substantial competitors. n239

VI. Free Rider Concerns

Joint venture compulsory access rules invite legitimate concerns about free riding. Firms participate in ventures because they anticipate gains, but participation involves significant risks. Indeed, many activities are undertaken by joint ventures precisely because the risks are so great that no firm acting alone wishes to bear them. Compulsory access rules would destroy the incentives to form ventures if they permitted firms to avoid joining at the time the venture is formed, when risk is high, because they know they could participate later, when the risks have been reduced or eliminated, n240 Any profit-maximizing firms would wait-and-see, leaving others to commit their resources during the initial period of high risk and presumably low or negative return. As a result, the venture would never be formed at all.

But free rider concerns do not become decisive simply because they can be articulated, n241 Further, often practices that **[*97]** are labelled as free riding are nothing more than competition. This section develops these propositions:

1. Free riding must be distinguished from vertical integration, product complementarity, or other relationships among firms. Properly defined, free riding is an output reducing strategy. For example, people like butter with their bread. As a result, bakers sell more bread because of a dairy industry in which they have made no investment. To call this phenomenon "free riding" serves no policy end, however. First, such product complementarity is ubiquitous and desirable. Second, the output of both bread and butter is larger because each "free rides" on the other in this fashion.

2. Free rider concerns are most serious in "closed" ventures -- that is, ventures whose membership is determined at the onset and who generally follow a policy of not admitting any subsequent members.

3. Free rider arguments become much harder to sustain when a venture is "open," pursuing a policy of continuing to accept new members in the future, but excluding on a selective basis. In these cases, free rider arguments do not necessarily have to be dismissed out of hand, but they should be scrutinized very closely and the presumption should be against them. In general, free rider claims should be disregarded when the effect of admission of the excluded firm is to increase output within the venture, with an exception only for clear cases of misappropriation of intellectual property or other property rights.

A. The Relation Between Free Riding and Output

Free riding occurs when a firm is able to capture the benefits of investment that another firm has made without paying for them. In antitrust the now-classic example of the free rider **[*98]** is the dealer in a manufactured product who rides on the promotional or service efforts of other dealers.

For example, the full service computer dealer may have, among other things, an expensive showroom, trained personnel demonstrating computers and assembling optimal packages, seminars for prospective purchasers. The free riding dealer down the street has a cheap warehouse, untrained minimum wage personnel, and stacks of computers in boxes. Customers will go to the full service dealer and obtain the information they need to make a wise choice; then they will go to the free rider to make their purchase at a lower price, n242 Likewise, the firm that "invents around" a patent, making a cheap copy of something that required much more investment to develop in the first place, is a free rider.

Free riding in both of these examples is economically inefficient because it leads to reduced output. In the case of vertical restraint, the dealer unable to capture the cost of its promotional efforts will have less incentive to invest. To the extent the full service dealer must compete with free riding dealers on price, the only way the full service dealer can survive is by cutting services itself. When that happens, overall demand for the supplier's product goes down. Once customers are unable to obtain any point-of-sale educational services, they will shop for a different brand, n243

In the case of the firm that "invents around" another's patented invention, the more tolerant the patent laws are of such evasions, the fewer patenting returns. The firm who knows that its innovations can be cheaply and legally duplicated may decide not to invest very much in innovation, and as a result, less innovation overall will take place. If innovation itself is output increasing, as we assume it is, then the result of widespread cheating on patents will be to reduce output.

This emphasis on output effects is important, because it distinguishes between free riding as a problem for competition policy and simple product complementarity. Bakers are in a sense "free riders" on dairies that churn butter, because the bakers are trading with the knowledge that people like bread **[*99]** with their butter; or, to put it another way, the dairy's investment in butter production results in the sale of more bread.

But if this phenomenon is to be labelled "free riding," it is not the kind of free riding that is of any concern to antitrust policy or law, for it results in increased rather than decreased output. Bread production actually stimulates demand for butter, and vice-versa, notwithstanding the fact that each producer takes a "free ride" on the investment made by the other.

In assessing the output effects of free riding, one must also distinguish long-run from short-run output effects. In the shortrun, output actually increases when the "no frills" dealer sells at a lower price, because lower prices attract more customers. Likewise, output often increases when a patentee's rival is able to invent around the patent; the product at issue will be produced under a certain amount of competition. Nevertheless, free riding tends to reduce output because the long-term effect is to give the full service dealer and the innovating patentee less incentive to make future investments. If free riding by "no frills" dealers cannot be eliminated, then the incentive to invest in a full service dealership will be reduced. The eventual result will be fewer consumer services in that brand overall, and then consumers will respond by buying less. Likewise, if patents can easily be evaded by rivals, the incentive to invest in inventions that require patent protection will be greatly reduced. The result will be less investment in research and development.

But this need to distinguish between short-run and long-run output reductions makes true free riding difficult to identify, and its efficiency effects hard to measure. Free riding claims are easily asserted, but valid claims must be distinguished from those that are frivolous, or those that confuse free riding with simple product complementarity. Antitrust policy should encourage joint ventures that are efficient, that is when they enlarge output. But the antitrust tribunal must also consider the impact of its decision on the formation of future ventures. A decision that tends to increase the output of the particular venture in front of the court may, in fact, result in reduced output over the long haul if the decision itself dissuades other firms from forming similar ventures.

B. Free Riding and Closed Ventures

Suppose three out of four automobile manufacturers decide to engage in joint development of a new, more fuel efficient [*100] engine. The research will be costly, and there is a substantial risk that it will produce nothing. Three of the four manufacturers decide to participate, but the fourth declines, assessing the risks as too high in proportion to the anticipated returns. A few years later the research proves successful, and the new engine looks like it will become a reality. Now the fourth automobile manufacturer asks to join, and the three venturers decline. In this case, antitrust laws should generally not afford a remedy. If the four firms each knew in advance that they could have waited to see if the venture succeeded and would have a right to join at that time, then none would have been willing to take the initial risk. The venture would never have been formed.

Holding that the closed venture has no duty to deal is presumptively similar to holding that it is not illegal for a single firm to dominate a market. That is, the status of being a monopolist is not illegal. However, additional

exclusionary acts other than the refusal to take on new members should generally be subjected to ordinary antitrust analysis.

Compulsory access is arguably an appropriate remedy if the venture presents a substantial risk of unlawful collusion among members. On the one hand, forced accommodation of additional firms can make a cartel less stable or simply break it up. On the other hand, this conclusion cannot be assumed; the entry of only one additional firm is not likely to break up a cartel, and more direct remedies would seem to be superior, n244

In sum, in the absence of collusion or an exclusionary practice such as patent misuse or predation, there is very little reason for antitrust laws to force admission into ventures that were intended to be closed from their inception.

C. Open Membership Ventures

An open-membership venture is one in which new members are admitted after the venture is initially created, and may be continuously admitted on an ongoing basis. Most trade associations are of this type, and so are "network" joint ventures **[*101]** such as the VISA and MasterCard bankcard systems, n245 Other joint ventures, such as the National Football League or the Big Ten Football Conference, may have highly restrictive membership policies, but they do occasionally admit new members upon application and approval by existing members, n246

By contrast to closed-membership ventures, antitrust policy is appropriately concerned with the selective membership policies of open membership ventures, provided that the venture controls a sufficient share of a properly defined relevant market, n247 Markets are artificial

creatures, and open-membership ventures with market power can effectively determine their workings or select their participants. For example, exclusion from membership in a real estate multiple listing service is practically tantamount to exclusion from the real estate profession, n248 When the open-membership joint venture has substantial market power, selective exclusion may become a device for cartelizing a market -- as, for example, when the multiple listing service rejects real estate firms that have a reputation for reducing their commissions. They may, however, become a device for restraining the development of a competing product or process -- as, for example, when a society dominated by steel conduit manufacturers reject a firm simply because it ['102] makes an alternative product, e.g., plastic conduit, that threatens the profits of the existing members, n249

To be sure, even open-membership joint ventures may be subject to free riding. When the venture pursues a general policy of taking on new members but selectively excludes a few, the traditional free rider argument becomes far more strained. For example, Visa generally permits new banks or financial institutions to join, but has a by-law that excludes offerors of competing charge cards, n250 If this policy is to be defended by a "free rider" argument, there must be some basis for concluding that issuers of competing cards are free riders in a way that other financial institutions are not. Further, the court must be able to distinguish between free riding concerns with the simple desire to avoid competition.

For open membership ventures, the free rider argument that the new applicant did not incur any risk at formation time is irrelevant. None of the subsequently admitted members had to incur these risks, but most are admitted nonetheless. To be sure, this does not undermine all free rider arguments. There still may be claims of

misappropriation of intellectual property rights. Some firms may be in a particularly good position to use the joint venture's intellectual property in a way that shifts sales away from the venture product and toward the competing product. For example, suppose that one large computer maker offers a proprietary processing chip. A joint venture of smaller computer manufacturers have developed a superior chip, which they sell to their members, but the process for making this chip is subject to some trade secrets. The large firm now seeks access to the venture so that it can learn the trade secrets and apply them to its own chip.

The large firm is a free rider in this case because the impact of its entry into the venture will be reduced output of the venture's computer chip. The large firm does not intend to use the joint venture's chip at all, but merely to steal some technology so that it can improve its own chip. The free rider claim is legitimate because if the large firm is admitted the result will be reduced output within the venture. **['1031**

But such claims must be distinguished from the much more common reason underlying exclusion of competitors: namely, that admission of the aggressive applicant will steal market share from existing members. For example, suppose the local real estate industry has a comprehensive multiple listing service, and charges fairly constant seven percent commissions on real property sales. New applicants for multiple listing membership are routinely accepted, but when a new firm advertising five percent commissions applies, it is rejected. In this case, admission of the new applicant would increase the output of the multiple-listing venture as a whole. That is, with the new low commission member in the venture, the price of property would be lower and more would be sold. However, the more relevant impact for existing members is that, although venture-wide output would be increased,

they could anticipate that their individual outputs would be decreased. Seller's would opt for the firm charging the five percent commissions, n251

The VISA/Discover case presents the same situation, n252 Historically, the Visa joint venture had an open membership policy for qualifying financial institutions. In 1976 the Visa board admitted MasterCard issuers to be members, and eventually more than 90% of the venture's members issued both cards, n253 In the 1980s, however, Visa was faced with the development of rival Discover Card, a proprietary general purpose charge card. n254 After an initial period of trying to drive Discover out of the market by denying it access to merchant processor terminals, n255 Visa proposed to admit Dean Witter, Discover's owner, into the venture, but to convert Discover into a VISA card. n256 Dean Witter declined that offer and applied for membership in Visa, intending to issue VISA as well as Discover cards. n257 The Visa board then adopted a bylaw designed to exclude from Visa any firm that offered a competing charge card. n258 **['104]**

When Discover charged a Sherman Act violation, Visa raised a "free rider" defense. In this case, however, Discover's entry into the Visa venture would have increased rather than decreased the output of VISA cards. The fear was not that Discover might steal certain secrets, and then apply them to Discover in such a fashion as to make Discover more appealing than VISA. Rather, the fear was that Dean Witter would be able to market a "package" including both a proprietary Discover Card and an Interbank VISA card, in much the same way that most Visa members packaged a VISA and a MasterCard. That is, Discover and VISA would be offered as complimentary products, and overall output of both would increase.

Although a Discover/VISA package would increase rather than decrease the output of VISA cards, and presumably of VISA transactions, existing members opposed it for the same reason that the multiple listing members in the earlier hypothetical resisted admission of the price cutter. Although venture output as a whole would increase, all of the gains would accrue to the new member, and the new member even threatened to steal market share from the existing firms. n259

One of the best indicators of this fact is that the Visa venture so willingly accommodated MasterCard, even though it, too, was a competing card. The ability of member financial institutions to offer a MasterCard/VISA package was attractive to consumers as well. But the all important difference between accommodation of MasterCard and accommodation of Discover is that, each existing member was free to offer a MasterCard. Thus, admitting MasterCard increased the output of the venture as a whole, but the output increase was more-or-less evenly divided among all banks that wished to offer both cards.

In sum, the difference between MasterCard and Discover is the difference between economies that accrue to oneself and economies that accrue to one's rivals. All economies benefit consumers. However, business firms see the matter differently. Although they benefit from economies that they are able to claim for themselves, they are generally injured by economies **['105]** that accrue to rivals. That is why, for example, they look eagerly for efficient joint ventures for themselves, but look for ways to challenge the joint ventures of their competitors, n260

When assessing free rider concerns, one must look at the long-run, and Ex ante concerns are particularly important. Judicially enforced admission of rivals may destroy the incentive to form a joint venture in the first

place. This argument becomes strained, however, in the case of a venture like Visa, which has a policy of admitting virtually all who apply. More importantly, it is not "free riding" when a new entrant either (a) threatens to undermine collusion among existing members or (b) threatens by its own innovations to force more aggressive competition within the venture. Both of these outcomes tend to increase rather than diminish output.

There may be more particularized intellectual property concerns. For example, Visa may have developed a new method for processing transactions more efficiently than alternatives. If Dean Witter becomes a Visa member it would acquire the secret, and may then be in a position to apply the process to Discover as well as Visa transactions. Such concerns, if proven, are legitimate; but they cannot simply be assumed under some general claim of free riding.

In sum, the real problem in the VISA case is not that the VISA card and the Discover Card are competitors, n261 The problem is that they are complements, like bread and butter or hardware and software. The real injury to current VISA issuers is that Dean Witter will promote a VISA/Discover package that will be either more attractive to consumers than other alternatives on the market or will have lower costs. In that case the result will be increased demand for Visa's cards, but the increase will accrue to the owner of Discover.

Finally, free rider defenses should be rejected when the firm that controls the input is able to sell, rather than give away, the good or service that is subject to the free ride. n262 For **['106]** example, in the context of vertical restraints, free riding is a problem because the typical dealer is not in a position to charge customers separately for the point-of-sale services that make the full service dealership valuable to suppliers and consumers. Rather, the cost of the services is

built into the full service dealer's package price. However, if the dealer could price the service and the product separately, then free riding would not be a problem. The customer already will have paid for the services, and both the full-service dealer and the discounter could compete for the product strictly on price, n263

In sum, in order for an open-membership joint venture to maintain a free rider defense it must show that: first, the claimed free rider is in a position to appropriate intellectual property or other rights in a way that threatens to reduce the output of the venture in the long-run; and second, the particular property right at issue cannot reasonably be sold, rather than given away, to the firm against which free riding is claimed.

VII. Less Restrictive Alternatives

One of the most important doctrines of the rule of reason is that the restraint must be no broader than necessary to achieve its legitimate goals, n264 Indeed, this "overbreadth" rule was part of the common law of trade restraints long before the Sherman Act was passed, n265 The rationale is simple enough: if ['107] an agreement with any significant potential to harm competition is justified by its potential for efficiency, then the agreement must be tailored in such a fashion as to do the least harm possible to competition without giving up the efficiency gains, n266

Assuming the claim is legitimate and that free rider concerns are substantial, one naturally asks: why not simply pass a rule that issuers of competing cards cannot be board members. If such a rule would alleviate the concerns about access to intellectual property while doing far less injury to competition than a rule excluding Discover from Visa

altogether, then antitrust should condemn the broader rule as long as the defendant is unable to show that the narrower rule will not work. n267

Of course, just as efficiency defenses or free rider claims should not be accepted simply because they are offered, so too not every suggestion of a less restrictive alternative will prove workable. But business firms often have great flexibility to create or preserve efficiencies by a variety of means. Once the plaintiff offers what reasonably appears to be a less harmful but equally efficient alternative to a challenged restraint, the burden should shift to the defendant to show why the offered alternative is not workable, or why it would not achieve the efficiencies claimed for the challenged restraint. **['108]**

VIII. The Appropriate Scope of Access Claims

A. Distinguishing "Universal" from Limited Access Rights; "Essential Facility" Claims

A troublesome feature of "network" joint ventures is that, although the decision to exclude is often anticompetitive, clearly not everyone has a right to participate. Consider, for example, two complex ventures whose ongoing cooperation is necessary to deliver the venture's product: AP and the NFL. AP was thrown open by the Supreme Court's decision to any newspaper that wanted to apply, n268 But surely an antitrust court should not go so far as to hold that any qualified group of eleven strong athletes plus a coach should be permitted to join the NFL. n269 Why shouldn't IBM or Ross Perot simply be able to put together a group of good players and then insist on a right to join the NFL? What distinctions between Visa and the NFL as ventures requires open access in one but not the other, and can antitrust develop workable rules for giving effect to these distinctions?

Antitrust's purpose is not to define the appropriate scope of joint ventures, but rather to identify and condemn restraints on competition. Apropos of this, a few things seem important. First, NFL football teams are not in any substantial sense economic competitors with each other. Of course, they do compete in some ways. If both the Cowboys and the Dolphins are playing at the same time on different television channels, they may compete for television revenue. But in the main, each team seeks gate receipts in its own town, and competes for television or radio revenues with other forms of programming. Second, although the NFL has severe access rules that deny new membership to just about everyone, the rules are not defined in terms of impact on competition with existing members. Indeed, when they are defined in this fashion, antitrust may intervene, n270 The Associated Press case provides a good **['109]** illustration: n271 the AP rule admitted all applicants generally, but imposed more restrictive membership rules on competing newspapers in the same town. If AP's domination of the wire service gave the first newspaper in town to become a member a substantial competitive advantage over other newspapers in that town, and if these others were then unable to join, the result could be a substantial opportunity for the exercise of market power. In sum, the thing being challenged in cases such as Associated Press and VISA is not the venture's right to limit its size. Rather, the challenge is to a policy of not limiting size as a general proposition, but then discriminating against competitors.

Thus if Visa were to decide that, for administrative reasons, it would be best to cut off membership at 600 and admit no additional applications, antitrust would have no complaint. Nothing is gained by forcing either firms or joint ventures to grow inefficiently large, and antitrust courts would not be good judges of optimal scale. Likewise, if Visa had set strict financial requirements that only a few hundred

banks could meet, it is hard to see the basis of an antitrust complaint. The problem with the rule that was actually challenged in the VISA case is that it admitted financial institutions generally, but imposed a heavy premium on competition as such.

Antitrust concern with restraints on competition generally entails that concerns about "essentiality" are misplaced. n272 The essential facility doctrine defines access from the applicants' perspective by asking whether access to a market really requires access to a particular facility. But focusing on essentiality tends to undermine antitrust's concern with competition. The concern of antitrust is not with the abstract ability of each firm to participate in a market. Rather, it is concerned with the ability of firms to raise price above the competitive level and hold it there for extensive periods of time. **[*110]**

The essential facility doctrine developed out of cases in the regulated industries, n273 and is infected by the regulated industries' preference for universal access. But defining antitrust access rules in terms of essentiality is both over and underinclusive. First, it is over-inclusive to the extent it suggests that weak or inefficient firms have some right that competitors give them a helping hand. In this sense, the essential facility doctrine is a relic of the populism that infected antitrust in earlier eras.

Second, the essential facility doctrine is under-inclusive because firms may acquire considerable power to raise price above the competitive level without acquiring anything like the ability to exclude everyone. Indeed, many monopolistic pricing strategies contemplate a fringe of firms remaining in the market, n274 Strictly speaking, almost nothing is essential. For example, if a truly large firm such

as General Motors wished, it undoubtedly has the resources to develop a network of competing professional football teams much like the NFL.

Likewise, an essentiality requirement misses the point when admission of the applicant would have no impact on competition, or when the venture is already behaving competitively. For example, the NFL may be an "essential facility" for a team wishing to play televised professional football. But supposing Iowa City's collection of paid football players, the Buccaneers, wished to join the NFL, the essential facility doctrine would not come to their rescue. There would be no more competition in the NFL after the Buccaneers were admitted than before, n275 Further, suppose that the highly competitive market for professional truck rivers is governed by the requirement that every operator have a chauffeur's license. A local government, acting arbitrarily and without any authorization from the state, denies one applicant a license, n276 This local government might be liable **[*111]** to the applicant under many legal rules, but antitrust's essential facility doctrine should not be one of them. The market is no less competitive as a result of the applicant's exclusion, n277

In any event, the history of Supreme Court decisions on joint venture access rules makes a very poor case for application of any modern-day essential facility doctrine. The Supreme Court's decree in Terminal Railroad, often cited as the first "essential facility" decision, n278 permitted everyone either to be a customer of the facility or else an owner, on nondiscriminatory terms. Essentiality was never required. Under the Court's decree the defendant's were entitled to give every applicant a right to join, whether or not it could show essentiality. Of course, the facility may have been essential for everyone, n279 But in that case the

decree simply reflected the judiciary's traditional common *law concern that common carriers and other monopoly* public utilities be obliged to accommodate everyone, n280

The Associated Press case, also identified with the origins of the essential facility doctrine, was not about access to an essential facility at all. It was about an explicit restraint on competition. Once again, no one was required to show essentiality. The Supreme Court merely held that in taking on new members AP could not discriminate against newspapers who competed with an existing AP member, n281

In sum, the antitrust laws are concerned, not with joint venture access rules as such, but rather with restraints on competition. In this sense, antitrust analysis of joint ventures is no different than antitrust analysis of any other business practice. For example, antitrust interferes with price fixing, not because it believes courts are better than market participants **['112]** at setting prices, but because firms are not permitted to eliminate competition as a factor in the price setting process.

B. Intersystem Rivalry Defenses

When speaking of joint ventures and competition, it is sometimes useful to distinguish between competition at the member level and competition at the system level. For example, at the system level MasterCard is a general purpose bank charge card that competes to one degree or another with VISA, Discover, American Express, or Diners Club. By contrast, at the member level MasterCard consists of several thousand card issuing banks that also compete with each other on such things as annual fees, interest rates, the "grace period" for bill payment, and frills such as flight insurance, extended product warranties, theft protection, and the like.

Not all ventures face competition at both levels. For example, if the relevant market is televised professional football, the NFL probably has no system level rivals. Likewise, in many ventures that are competitive at the system level there may be very little competition in the joint venture product at the member level. Indeed, members of joint ventures need not be competitors at all. Sometimes they are vertically related firms, manufacturers of complimentary products, n282 or sellers in different geographic markets, n283

Antitrust's concern with competition is quite general, and both member level and system level competition falls within its domain. One must not confuse competition with rivalry, however. If Associated Press should succeed in driving weaker UPI plus other wire services out of business, it would have no rivals. But that fact alone says absolutely nothing about the impact of AP's dominance on competition. The market may actually be more competitive if AP is the only survivor. First, if AP is a natural monopoly, its costs would be lower than the costs facing any combination of two or more firms in the market. In that case, price could actually be lower when AP is the **['113]** only venture than when AP co-exists with LIP and INS. Second, member level competition can make system level competition superfluous.

Antitrust's concern is with economic competition, and although the number of rivals is sometimes important in determining the degree of competition, it is not always decisive. What is decisive is the relationship between a firm's prices and its costs when the firm is taking advantage of all available efficiencies. In answering that question the number of systems may be quite irrelevant, provided that intrasystem rivalry is unrestrained, n284 The system itself has no outside owners; its owners are its members. As a result it cannot generally make money by selling to itself at a

monopoly price. It cannot sell to others at a monopoly price unless its members agree with each other to reduce their output of some good or service -- something that the antitrust laws should forbid them from doing.

Suppose, for instance, that MasterCard were the only bankcard system, and that its several thousand members occupied 100% of a properly defined relevant market. However, these members compete vigorously with each other both in card member terms and in the interchange fees that are passed on to merchants. We would expect competition to eliminate monopoly profits for all the various services and transactions relevant to the offering of an interbank charge card.

Suppose now that the DOJ, thinking MasterCard an unlawful monopoly, were to split it into two entirely separate ventures, called MasterCard and VISA. There would now be cards bearing two different names. But if competition was unrestrained before this breakup, we would not expect any impact at all on the pricing of services, the nature of the services offered to either consumers or merchants, and the like. Indeed, if there were substantial economies of scale in the organization of **['114]** an interbank general purpose charge card venture, the costs of two different systems might go up, and prices would go up as well.

The relationship between VISA and MasterCard in the United States is sometimes cited as evidence that intersystem rivalry benefits customers. Before 1974, VISA and MasterCard had exclusivity rules that prevented any financial institution from offering both cards. However, in response to a lawsuit from a bank wishing to offer both, n285 the rule was set aside, n286 Today the vast majority of

members offer both. Visa subsequently contended that the result of the VISA/MasterCard duality was that competition between the two cards was significantly diminished, n287

But any diminution of competition results, not from duality itself, but from the fact that within the ventures issuing banks are permitted to fix bank "interchange" fees that merchants were charged for accepting VISA card. n288 In the face of unbridled competition, there is no reason for thinking that duality would increase the price of bank charge cards.

Indeed, sometimes duality can increase competition significantly. Consider Discover's entry into Visa. The all important difference between the duality of VISA and MasterCard, and the duality of VISA and Discover, is that in the former union every member of Visa was permitted to offer a MasterCard, and vice-versa. By contrast, the Discover Card is proprietary, so only Dean Witter can issue it. The impact of Dean Witter's ability to package a VISA card and a Discover Card will be a more attractive consumer offering. Other Visa members who wish to retain their market shares will have to improve their own offerings or cut price in order to retain their customer base.

The incentives from Discover's perspective are only slightly different. Dean Witter would control 100% of Discover ['115] transactions and some small percentage of Visa transactions -- let's assume 5%, which it might acquire by competing very aggressively for VISA card holders. For any future transaction, if that transaction is made with a Discover Card, Dean Witter will be sure to get it. By contrast, if it is made with a VISA there is only a 5% chance that Dean Witter will get it, since 95% of VISA cards are controlled by other members. As a result, Dean Witter has almost the same set of incentives to push Discover at the expense of VISA as it had before it joined the venture. In

sum, then, Dean Witter's admission into Visa has two effects on competition: (1) competition among VISA issuers becomes more intense; but (2) competition between Visa and Discover remains virtually undiminished, or else it becomes more intense to the extent that other VISA issuers try to make Visa a more attractive offering than Discover.

Intersystem rivalry becomes more important if member level competition is inadequate. If the MasterCard joint venture closed itself to new membership when it reached a membership total of ten large banks, and these banks were behaving collusively or oligopolistically, then the development of alternative systems might force the MasterCard venture to behave more competitively itself.

To be sure, once Associated Press is thrown open to every newspaper that wishes to apply, then no one will be forced to develop a rival news wire service such as United Press International. n289 Some write as if compulsory access rules are seriously anticompetitive because they destroy the opportunity for increased system-level competition, n290 But that proposition is hardly self-evident. First, as noted above, increasing the number of systems does not necessarily increase the amount of economic competition at all unless intrasystem competition is restrained. Further, if scale economies are substantial, as they often are in network joint ventures, then multiplying networks may actually result in increased rather than decreased costs.

Second, compulsory access rules do not foreclose the development of alternative systems; rather, they simply give prospective entrants into a market the choice between joining an existing venture or starting out on their own. At the margin, the **[*1116]** firm will do what was most profitable, n291 For example, if the existing venture produced no scale economies or risk reductions and wielded no market power, a new firm might be indifferent as to whether it joined the

venture or struck out on its own. By contrast, if the existing venture was colluding, a new f'irm might be better off starting out on its own. It would be able to sell at the cartel price without having to worry about venture imposed output reductions. Alternatively, if the venture produced substantial scale economies then the rum would opt for the venture -- but the presence of such economies is good evidence that antitrust policy would not be well served by forcing alternative ventures.

Measurement of risk and economies of scale in a given situation is difficult if not impossible. No antitrust tribunal can look at a venture such as Visa and proclaim that the market has room for one, two or six such ventures of minimum optimal size. The value of compulsory access rules is then that they permit new firms constantly to test the costs and returns of operating within the venture against the costs and returns of pursuing alternatives.

For example, the aftermath of the Associated Press case was that, once compulsory access was put into place, AP quickly grew into the dominant wire service, and incipient rivals UP and INS languished, n292 But this is simply another way of saying that UP and INS would probably never have developed in the first place had it not been for AP's membership restrictions. Given the high fixed costs of producing news, and the infinite duplicability of a news story, AP was a natural monopoly. Any newspaper would have been better off participating in large, low-cost AP rather than smaller, more expensive UP or INS. To be sure, the growth of this monopoly might raise concerns about press freedom or the preservation of alternative news sources in a democratic society. But those are not the concerns of antitrust law.

When competition among venture members is vigorous, multiplying the number of systems cannot save resources unless we postulate that the costs of operating a single system are higher than the costs of operating multiple systems, and this certainly cannot be presumed. Multiplying the number of systems saves ['117] resources only if there is some reason for thinking that multiplying systems will increase the amount of competition. If decisions on price and output are already made by members behaving competitively, this is generally not the case.

Often multiplying systems will not increase rivalry even if the firms in the initial system are not competing. For example, suppose we simply divided the NCAA in half, placing half its schools in one football association and the other half in the other. Game schedules would have to be redrawn and there would be a re-alignment of team rivalries, but there is no reason for thinking that individual colleges would compete for advertising dollars any more aggressively than they do today under a venture that permits each college to televise as many games as it pleases. Changing the number of systems has no impact on competition when the relevant competitive decision occurs at the member level rather than the system level to begin with, and multiplying systems has no impact on member level market structure.

So encouraging a proliferation of systems is not necessarily in the interest of consumers at all. Further, claims made in litigation that exclusion will encourage system level competition are manifestly disingenuous, and ought to be ignored when they are made by the antitrust defendant itself. Consider Associated Press, where the Supreme Court condemned AP's policy of excluding second newspapers in towns that already had an AP member. Suppose that AP's principal defense was that the impact of the exclusionary rule was to facilitate the development of

alternative wire services, and that this would promote system-level rivalry.

If that were the principal effect of the exclusive policy, AP would never have adopted the policy. Like any profit-maximizers, AP's members would adopt the policy that maximized their own profits, which comes from minimizing the amount of competition with others, n293

IX. Administration of Antitrust Access Decrees

['118]

It is sometimes said that administration of joint venture decrees striking down exclusion rules requires courts to operate as regulatory agencies, or otherwise involves courts in ongoing administration for which they are not well suited, n294 Certainly courts must ensure that their decrees are capable of being administered, and complex antitrust decrees can yield difficult problems of administration. But in the range of antitrust decrees that need ongoing administration, administering joint venture membership policies hardly qualifies as the most complex.

Antitrust decrees are thought to be particularly difficult to administer, because they often require knowledge about markets that is simply not available to generalist federal judges. Defendants are ordered to do something that they would prefer not to do, and they will look for ways to do as little as possible, to delay, or to maximize their own position within the confines of the injunction without regard to the welfare of the injunction's beneficiaries. Administration of antitrust decrees is particularly difficult when the decree orders a firm to behave in an irrational matter, or when it orders a firm to set particular prices in areas where a great deal of discretion remains over such issues as proper rate of return or

allocation of costs. So, for example, the late Donald Turner once noted the difficulties that would inhere in any injunction ordering an oligopolistic firm to behave competitively. A large firm in a concentrated market is necessarily a price maker, and cannot be changed into a price taker merely by a court order, n295

But not all decrees are equally difficult to administer, and compulsory access decrees certainly need not be among the ['119] most difficult. The most difficult decrees to administer are those requiring a venture to adopt some brand new policy or to set a fair price for participation where the market has not made any prior determination of what that price should be. To return to a previous example, suppose three of four auto makers jointly developed a more fuel efficient engine and now a court erroneously decides that a fourth firm is entitled to be a late joiner, n296 The court orders the venturers to admit the fourth upon payment of the fair value of the risks undertaken and work done by the venture. Even experts could differ over a wide range on the question of the venture's value at the time entry is sought, the amount of compensation needed for risk, and so on. One of the inherent qualities of innovation is that, since the innovated product is new, little is known about its future demand, costs of production, difficulties that might emerge along the way, and so on.

In most compulsory access cases, however, the administration problem is far more tractable. For example, the district court in the VISA case condemned a rule under which the Visa venture would admit new applicants generally, but exclude those who issued a competing charge card. A decree tailored to the decision would simply order the venture to admit everyone on the same terms, without regard to whether they issued a competing card. n297

Important as it is not to underestimate the difficulty of enforcing even simple judicial decrees, in the range of antitrust injunctions this is not a particularly complex one.

Those who object to compelling joint venture inclusion on administration grounds must have in mind joint venture decision making where each membership application is subject to the whim of existing members or their board. This might include the venture that has no membership rules whatsoever except that an applicant must receive the affirmative vote of two-thirds of existing members. Some applicants receive twothirds while others do not, and one of those who fails alleges that its exclusion was anticompetitive. Now the court has the ['120] difficult job of determining ex post what motivated the exclusion.

To be sure, evaluating such decisions can easily become complicated. But such cases pose problems of administration only in the sense that all rule of reason antitrust cases pose such problems. For example, this kind of antitrust case is common when physicians are denied staff privileges by a board, some of whose members may have anticompetitive motives, n298 Antitrust under the rule of reason requires courts to make ex post judgments about the competitiveness or anti-competitiveness of the defendant's conduct. The result of the set of such judgments is a guide to what firms can do in the future. Problems of determining intent, or of inferring intent from consequences, can be difficult. But they are not different in kind from those that affect the administration of decrees in antitrust as well as other areas of the law. n299

In this area, the problem of complying with judicial decrees is generally more tractable than the problem of complying with the broad range of statutes. Unless the decree is badly drafted, it is generally more specific to the entity and situation upon which it is being imposed than

any statute is. Once the decree is issued, counsel for those upon whom the decree is imposed and for those whom it is intended to benefit must interpret it and make some prediction about how the court will interpret it. In cases of dispute, they can litigate or compromise. Which one they do depends largely on the care with which the decree was drafted, but a well written decree should have fewer loopholes and ambiguities than the general run of statutes, for the decree is not subject to the debilitating effects of the political process. **['121]** Further, the decree is accompanied by its own detailed "legislative history" -- namely, the judicial opinions that preface it.

In sum, the problem of complying with access decrees is not different in kind nor magnitude from the problems of complying with the law generally. Very badly drafted decrees, or decrees that force firms to behave in ways that are fundamentally irrational or inconsistent with the position in which they find themselves are bound to generate subsequent problems of interpretation and enforcement.

X. Conclusion: Exclusive Joint Ventures and the Rule of Reason

Most joint ventures presumptively create efficiencies that make application of the per se rule inappropriate, certainly to exclusion rules that are related to the operations of the venture. Of course, this does not imply that all exclusion rules require full rule of reason treatment; even efficiency creating joint ventures can be used as a front for naked collusion. n300 But that exception aside, analysis of exclusionary joint ventures ordinarily proceeds through a rule of reason analysis that begins with market power.

The stages in the rule of reason inquiry differ when the challenge is to exclusion rather than collusion. Fundamentally, however, the analysis is the same. n301 The main difference is that the Supreme Court has indicated, and with good reason, that labelling a joint venture refusal to deal as "naked" is not quite as easy as labeling an explicit output reduction or price fix as naked. Exclusive membership rules can be justified in a wider variety of circumstances than can price-fixing rules. Since rule of reason analysis proceeds through a serious of steps, looking for the most expeditious ways of deciding the case first, **['122]** this suggests a change in the ordering. Rather than looking first for a "naked" restraint, we look first for at least a minimal indication of market power. The Indiana Dentist and Northwest Wholesale Stationers decisions seem to compel this result, n302 The principal exception to this rule occur when the refusal to deal is clearly nothing more than a cartel facilitator, as it was in Trial Lawyers. n303 Such cases are ordinarily easy to identify, however. For example, in Trial Lawyers the concerted refusal to deal was directed at customers, and its only purpose was to force the customer to pay more.

Once a qualifying "agreement" has been found, analysis of joint venture exclusion rules should then proceed through this series of questions:

1. Can the joint venture refusal to deal be interpreted as serving any rational purpose other than facilitation of price-fixing? If not, the refusal is illegal per se; if yes, proceed to the next step. n304 As a general matter, concerted refusals directed at customers are highly suspicious and should ordinarily be regarded as naked. Concerted refusals directed at rivals are less suspicious because they may result from discipline, good faith determination that the excluded firm offered substandard products or services, or products or services that are

inconsistent with the venture, or that the excluded firm was a free rider.

2. Does any aspect of the challenged venture or the exclusion rule or practice being challenged **['123]** threaten to reduce output or raise prices in some properly defined relevant market? In addressing this question, the court must first define relevant markets under ordinary antitrust principles for any market level at which competition might be threatened, n305 If the market share represented by the venture as a whole is so small that no anticompetitive output reduction is possible, then any agreement surviving the step one inquiry should be dismissed, n306 If power is found, proceed to step three.

3. Does the exclusionary practice or rule under challenge arguably further legitimate efficiency goals articulated by the venture? If not, the exclusive rule or policy should be condemned unless it survives the step four inquiry. For purposes of analysis under this step, "legitimate efficiency goals" means that the rule must be shown to increase venture-wide output for the existing venture. The reduction of competitive incentives for future similar ventures is a free rider concern, and is addressed in step four. In considering the impact on venture-wide output, the tribunal should compare the venture's output when the applicant is excluded, with its output after the applicant is admitted, including the output of the new member itself. A rule should not be deemed efficient simply because it enlarges the output of one or more particular members, or maximizes the output of those firms already in the venture. For example, the insurance trade association's decision to stop collecting statistical data for certain kinds of losses should be evaluated for its effect on the output of the insurance industry as a whole, not for its effect on the output of insurers who do not wish **['124]** to write the kinds of insurance which the excluded statistical data would have

supported. Likewise, in the VISA case the decision to exclude issuers of competing cards such as Discover should be evaluated for its impact on total VISA customers or transactions after Discover becomes a VISA issuer, not for its impact on existing members who may lose customers or transactions to the new member. If an exclusionary practice or rule increases venture-wide output, it should ordinarily be regarded as legal. If not, it is presumptively illegal unless the defendant can make the showing in step 4.

4. An exclusionary practice or rule that reduces venture-wide output in the venture at hand may nevertheless be saved from illegality if free rider concerns are sufficient to produce substantial disincentives to creating similar ventures in the future. In the case of closed-member joint ventures (i.e., joint ventures that have not expanded beyond their initial membership), there should be a presumption in favor of articulable free rider concerns, including the concern that a rule permitting late comers to join without undergoing entry level risks will deter future similar ventures. In the case of ventures that have generally open membership policies but that exclude current applicants selectively, this particular free rider argument will not work; indeed, the fact that acceptance of the new member increases venture-wide output should be regarded as strong evidence that free rider concerns are insubstantial. If free rider concerns are nevertheless claimed, they should be explicitly defined and proven.

5. Even if free rider concerns are found to be legitimate, the plaintiff can rebut by showing less restrictive alternatives that will alleviate the **['125]** concerns and yet permit membership, n307 These alternatives may include an entry fee designed to compensate existing members for risk or other losses that flow from their own prior membership, n308 Any substantial propensity toward collusion at the member level should count heavily against the venture's

exclusion rule. Forced accommodation of new members can quickly break down a cartel.

Finally, on questions of standing, antitrust injury, and defenses:

6. Standing should generally be limited to firms that compete (or will compete after admission) with at least one joint venture member. None of the anti-competitive rationales for joint venture exclusion discussed in this article have any application to excluded firms who do not compete with the venturers, n309 At the same time, defenses of the nature that exclusion is competitive because it encourages intersystem rivalry should be rejected. If the principal effect of admitting an applicant to the venture is to diminish the likelihood of intersystem rivalry, the venture that did not admit the applicant would be acting irrationally.

FOOTNOTES:

Nl For a general overview of the antitrust law of joint ventures, see Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice section 5.2 (1994). The multiple actor requirement excludes joint activities by wholly owned subsidiaries of the same parent, or by other firms related by common ownership; that is, an enterprise carried on by two branches of the same firm is not a "joint" venture, as far as antitrust policy is concerned. See *Copperweld Corp. v. Independence Tube Corp, 467 U.S. 752 (1984);* Phillip E. Areeda, Antitrust Law paragraph 1463 (1986).

n2 As in *United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964)* (corporation); and *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912)* (corporation) -- see *State v. Terminal Ass'n of St. Louis, 182 Mo. 284, 81 S.W. 395 (1904).*

n3 As in *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 301 (2d Cir. 1979)* (contractual arrangement between Kodak and GE), cert. denied, *444 U.S. 1093 (1980).*

n4 An input is anything the firm uses or consumes in the production or distribution of its product.

n5 For recent literature, see Thomas M. Jorde & David J. Teece, Antitrust, Innovation, and Competitiveness (1992); Thomas M. Jorde & David J. Teece, Acceptable Cooperation Among Competitors in the Face of Growing International Competition, *58 Antitrust L.J. 529 (1989);* Thomas M. Jorde & David J. Teece, Innovation and Cooperation: Implications for Competition and Antitrust, 4 J. Econ. Persp. 75 (1990); Thomas M. Jorde & David J. Teece, Innovation, Cooperation, and Antitrust: Balancing Competition and Cooperation, 4 High Tech. L.J. 1 (1989); Carl Shapiro & Robert D. Willig, On the Antitrust Treatment of Production Joint Ventures, 4 J. Econ. Persp. 113 (1990); Gene Grossman & Carl Shapiro, Research Joint Ventures: an Antitrust Analysis, 2 J.L. Econ. & Org. 315 (1986); Janusz A. Ordover & Robert D. Willig, Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers, *28 J.L & Econ. 311 (1985).* An earlier treatment that has almost become a classic is Joseph E. Brodley, Joint Ventures and Antitrust Policy, *95 Harv. L. Rev. 1521 (1982).*

n6 *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).* See discussion infra text accompanying notes 74-94. For an extended critique, see Herbert Hovenkamp, Enterprise and American Law, 1836-1937 at ch. 12 (1991).

n7 See *NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984).*

n8 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).*

n9 *Id. at 20* (noting that the Court of Appeals and CBS recognized that "costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants .... ").

nl0 A "decisive number" refers to any number that the joint venture settles on as necessary for making a certain rule. This could be a majority of members, or perhaps a supermajority such as two-thirds; it could also be a majority of voting shares where venture partners have unequal interests; or perhaps even a supermajority of shares. In some cases a venture might make decisions only by unanimous consent. In that case a "decisive number" can be one. See, for example, *Associated Press v. United States, 326 U.S. 1 (1945),* where under the original rule, a single newspaper in the same town as an applicant for new membership could veto the application. See the lower court opinion, *52 F. Supp. at 364,* and infra text accompanying notes 95-120.

n11 See infra text accompanying notes 168-182.

n12 *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988).* See infra text accompanying notes 169-71.

n13 See *Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).* See infra text accompanying notes 63-70.

n14 *Allied Tube, 486 U.S. 492.*

n15 See *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994).*

n16 In VISA, the Tenth Circuit concluded, erroneously, that a firm could not challenge joint venture exclusion unless the defendants excluded the plaintiff from the market altogether. See supra text accompanying note 15 and infra text accompanying notes 150-58.

n17 For example, the blanket licensing arrangement in the Broadcast Music decision (1) admitted all holders of performance rights that wished to be included; and (2) permitted any such holder to sell unlimited licenses outside the context of the blanket license arrangement. Under such rules, and with several thousand members, collusion is impossible. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).*

n18 For example, *Associated Press v. United States, 326 U.S. 1 (1945)* (member exclusion), came very close to applying such a rule. See infra text accompanying notes 32, 95-120. The record with respect to product exclusion is very much the same. See, e.g., *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961)* (applying essentially per se analysis, although "per se" label not used, to exclusion of plaintiffs gas heater from venture approval).

n19 E.g., Donald I. Baker, Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette, *4 Utah L Rev. 999 (1993).* See also William J. Baumol & Janusz A. Ordover, Antitrust: Source of Dynamic and Static Inefficiencies?, in Antitrust, Innovation, and Competitiveness 82 (Thomas M. Jorde & David J. Teece, eds. 1992); Grossman & Shapiro, supra note 5. However, not all economists agree that antitrust has interfered substantially with the ability of joint ventures to achieve available efficiencies. See, e.g., *Shapiro & Willig, supra* note 5, at 119-124 (noting that there is no evidence that antitrust policy stifles efficiency enhancing joint ventures); Joel B. Eisen, Antitrust Reform for Joint Production Ventures, *30 Jurimetrics J. 253, 261 (1990)* (noting that antitrust "not a large barrier" to formation of joint ventures). See also George L. Priest, Cartels and Patent License Arrangements, *20* J.L & *Econ. 309 (1977)* (developing methodologies for distinguishing efficient from inefficient arrangements on the basis of whether compensation goes from the patentee to the

joint licensees, or vice-versa); for example, if the called-for royalties are trivial, then the patent licensing arrangement is very likely a front for collusion. But cf., *United States v. General Electric, 272 U.S. 476 (1926)* (holding that patentee was entitled to restrict its licensee's prices).

n20 On the difference between joint ventures and mergers, see Hovenkamp, supra note 1, section 5.2d.

n21 See discussion infra, text accompanying notes 149-81. See also *Chicago Professional Sports Limited Partnership & WGN v. Nat'l Basketball Ass'n, 961 F.2d 667* (7th Cir.) (noting that a sports league operated as a joint venture in the organization of games, but more like a cartel in the sale of its output), cert. denied, *113 S. Ct. 409 (1992).*

n22 See, e.g., Baker, supra note 19; Dennis W. Carlton & J. Mark Klamer, The Need For Coordination Among Firms, With Special Reference to Network Industries, *50 U. Chi. L Rev. 446 (1983);* Hovenkamp, supra note 1, at section 5.6c.

n23 See, e.g., Request for Comments on Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, section 2.3, *59 Fed. Reg. 41,339, 41,340-41 (1994)* [hereinafter Intellectual Property Guidelines] (noting that restrictive licenses may be necessary to control free riding).

n24 See, e.g., Baker, supra note 19, at 1006 (defining a network joint venture as a combination of facilities and rules leading to exchanges of traffic and information).

n25 Such networks permit multiple banks to share ATM machines, and customers to withdraw or deposit monies through a machine managed by a bank other than the one in which they have an account. See William

Blumenthal, Three Vexing Issues under the Essential Facilities Doctrine: ATM Networks as Illustration, *58 Antitrust* LJ. *855 (1990).*

n26 See *NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984).*

n27 United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom., *Maryland v. United States, 460 U.S. 1001 (1983).*

n28 See Michael K. Kellogg et al., Federal Telecommunications Law 591-599 (1992).

n29 See infra text accompanying notes 151-59.

n30 For example, see *In re General Motors Corp., 103 F.T.C. 374, 388 (1984),* approving GM/Toyota production joint venture, subject to certain restrictions, where one effect would be to teach an American automobile manufacturer about Japanese production methods thought to be highly efficient. Two Commissioners dissented. One believed that the Commission exaggerated the learning potential and understated the potential for collusion. *Id. at 391* (Pertschuk, Commissioner, dissenting); the other believed that efficiencies, even if proven, should not be taken into account, and that the dangers of anticompetitive information exchanges were substantial. *Id. at 391-92* (Bailey, Commissioner, dissenting).

n31 See *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).* See infra text accompanying notes 81-94.

n32 See *Associated Press v. United States, 326 U.S. 1 (1945).* See infra text accompanying notes 95-120.

n33 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).*

n34 *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).*

n35 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).*

n36 See Isaiah L. Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure (2 vols. 1931); Gabriel Kolko, Railroads and Regulation, 1877-1916 35-70 (1965); Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, *97 Yale l-,J. 1017 (1988).*

n37 See Kellogg et al., supra note 28, at 602-610.

n38 See Hovenkamp, supra note 1, sections 19.1-19.2.

n39 See R. H. Coase, The Nature of the Firm, 4 Economica (n.s.) 386 (1937); R. H. Coase, The Firm, the Market, and the Law (1988); The Nature of the Firm: Origins, Evolution, and Development (Oliver E. Williamson & S. Winter, eds. 1991); Herbert Hovenkamp, Market Efficiency and the Domain of the Firm, *18 J. Corp. L 173 (1993).*

n40 Coase, supra note 39; Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975); Oliver E. Williamson, Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1982).

n41 See Oliver E. Williamson, Transaction-Cost Economics: the Governance of Contractual Relations, *22 J.L. & Econ. 233 (1979).* Indeed, the joint venture is a strong example of "neoclassical" contracting, in which the firms make longterm, open ended commitments that provide opportunities for future exercises of discretion. See Ian

MacNeil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, *72 Nw. U. L. Rev. 854 (1978).*

n42 *35 U.S.C. sections* 1-376 (1988).

n43 See Louis Kaplow, The Patent-Antitrust Intersection: A Reappraisal, *97 Harv. L. Rev. 1813 (1984).*

n44 That is, impairments that result from the cartel-like structure of the venture and not merely from the venture's anticipated patent or other intellectual property rights.

n45 That is, at least one person is better off and no one is worse off. To be sure, the addition of aluminum to the market in the illustration represents a pure Pareto improvement only if the remaining steel manufacturers are indifferent to the addition of aluminum, which cannot be presumed. However, they would be indifferent if (1) they had no fixed costs and were earning no economic profits, so they were indifferent to the loss of volume; or (2) they were compensated by the aluminum producer.

In any case, however, the addition of aluminum is a welfare improvement under the so-called potential Pareto criterion. Under this criterion, sometimes called Kaldor-Hicks efficiency, a move is efficient if the gains gain enough to compensate the losers so that the losers become indifferent. Thus, the illustration shows that perfect competition is not Kaldor-Hicks efficient if the model is permitted to take changes such as product innovation into account.

n46 E.g., Kenneth J.Arrow & Frank H. Hahn, General Competitive Analysis (1971).

n47 See Joseph A. Schumpeter, Capitalism, Socialism and Democracy (1942). On the development of the theory, see Richard Swedberg, Schumpeter: A Biography 136-166 (1991).

n48 Schumpeter, supra note 47, at 88, 103.

n49 Id. at ch. 8.

n50 A sampling of recent literature as well as classics: Kevin Arquit & Joseph Kattan, Efficiency Considerations and Horizontal Restraints, *36 Antitrust Bull 717, 722 (1991);* Michael L. Katz & Janusz A. Ordover, R&D Cooperation and Competition, in Brookings Papers on Economic Activity 137, 142 (Martin Neil Baily & Clifford Winston eds., 1990); Janusz A. Ordover & William Baumol, Antitrust Policy and High-Technology Industries, 4 Oxford Rev. Econ. Policy 13, 14 (1988); William L. Baldwin & John T. Scott, Market Structure and Technological Change (1987); Frederick. M. Scherer, Innovation and Growth: Schumpeterian Perspectives (1984); Partha Dasgupta, The Theory of Technological Competition, in New Developments in the Analysis of Market Structure 399 (Joseph E. Stiglitz & Frank Mathewson eds. 1986); Morton Kamien & Nancy Schwartz, Market Structure and Innovation 14-15 (1982); Robert Solow, Technical Change and the Aggregate Production Function, 39 Rev. Econ. & Stat. 312 (1957) (arguing that great majority of growth came from innovation).

n51 See, e.g., Harvey Leibenstein, Allocative Efficiency vs. X-Efficiency, *56 Am. Econ. Rev. 392 (1966);* John J. Siegfried & Edwin H. Wheeler, Cost Efficiency and Monopoly Power: A Survey, 21 Q. Rev. Econ. & Bus. 25 (1981).

n52 On this point, see Frederick M. Scherer & David Ross, Industrial Market Structure and Economic Performance 662-685 (3d ed. 1990).

n53 E.g., Baumol & Ordover, supra note 19. See also Thomas M. Jorde & David J. Teece, Rule of Reason Analysis of

Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology, *61 Antitrust L.J. 579, 599-600 (1993).*

n54 See Richard J. Gilbert & David M. G. Newbery, Preemptive Patenting and the Persistence of Monopoly, *72 Am. Econ. Rev. 514 (1982)* (monopolist's selection of patented technology); Oliver E. Williamson, Wage Rates as a Barrier to Entry: the Pennington Case in Perspective, 82 Q. J. Econ. 85 (1968) (selection of labor vs. capital intensive technology).

n55 *E.g,,Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988); SCFC ILC, Inc. v. VISA U.S.A., Inc.; 819 F. Supp. 956 (D.Utah 1993),* rev'd, *36 F.3d 958 (lOth Or. 1994).* See infra text accompanying notes 62-67, 151-85.

n56 See the discussion in Jean Tirole, The Theory of Industrial Organization 401-404 (1988). Others making the same suggestion include Joseph Kattan, Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation, *61 Antitrust* LJ. *937 (1993);* Janusz A. Ordover & Robert D. Willig, Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers, *28 J.L. & Econ. 311 (1985).* See generally Eric von Hippel, The Sources of Innovation 47-55 (1988).

n57 See Intellectual Property Guidelines, supra note 23, section 3.2.3 (speaking of agreements to restrict innovation); id. section 5.6 (relating to grantback agreements that may retard innovation).

n58 E.g., *SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958 (lOth Cir. 1994)* (inferring from the fact that individual Visa members behaved competitively toward each other that a jointly agreed to exclusion rule could not harm competition).

n59 The profitability of excluding aluminum does not depend on the existence of a steel cartel earning monopoly profits. Even if the steel producers were behaving competitively and earning only competitive returns on their investments, they would still be better off to exclude aluminum from the market if they thought significant numbers of customers would switch from steel to aluminum. The effect of the switch would be to reduce demand for steel below the current level. As a result, each firm would earn even less on its investment, and some firms might even have to leave the market.

[SEE FIGURE IN ORIGINAL]

Figure 1 illustrates the impact of a downward demand shift on the market as a whole. Downward-sloping demand curve D is the demand for steel before aluminum is introduced, while D' is the reduced demand for steel after aluminum appears on the market. As a result, the output of steel is reduced from Q to Q', entailing either that firms reduce their output or that at least one firm exits from the market. If the supply curve for steel is upward sloping, as in the figure, the price will also drop from P to P'. Even a competitive firm would hardly be indifferent to these losses.

[SEE FIGURE IN ORIGINAL]

Figure 2 illustrates the impact of a downward demand shift on a single competitive firm. Horizontal demand curve D shows demand facing the individual firm before the introduction of aluminum, and D' shows demand

after aluminum appears on the market. The firm will reduce its output from Q to Q', and its price will drop from P to P'. Whether the firm continues to earn a profit at the lower price depends on its average total costs. But if the average total cost curve bottoms out between D and D', as in the figure, the introduction of aluminum would move the firm from profits to losses.

n60 On the two forms of exclusion, see infra text accompanying notes 168-82.

n61 *American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982)* (affirming judgment on a jury verdict for the plaintiff).

n62 *Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988).* See also United States v. Motor Vehicle Mfrs. Ass'n, Inc., 1979-1 Trade Cas. paragraph 62,557 (C.D.Cal. 1979) (barring (through a consent decree) cooperative efforts to delay and obstruct development of automobile pollution control devices).

n63 *Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).*

n64 Conduit is a hard, impact and weather resistant tube through which electric wires are run in installations where the wire might be subjected to weather or other adverse conditions.

n65 See the lower court's opinion, *817 F.2d at 945.*

n66 See *Allied Tube, 486 U.S. at 496.* There was some concern, however, that during fires the PVC conduit would emit toxic fumes.

n67 *Id. at 497-498.* The plastic conduit was eventually approved in 1984. Today it enjoys widespread use as an alternative to steel conduit.

n68 *Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).*

n69 *Id. at 2896-2897* (most ISO members could not afford to write a certain kind of coverage if ISO withdrew its support services for that coverage).

n70 See *id. at 2896.*

n71 See infra text accompanying notes 149-81.

n72 But see John Hilke & Philip Nelson, Antitrust Policy and the Market Concentration Doctrine: A Response, J. Bus. Econ. 17 (1981) (arguing that antitrust focuses on dynamic concerns).

n73 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).*

n74 See supra text accompanying notes 41-60 and infra text accompanying notes 217-28.

n75 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).*

n76 *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).* On the economics of railroad operations during this era, see Hovenkamp, supra note 6.

n77 *United States v. Trans-Missouri Freight Ass'n, 58 F. 58, 79-80 (8th Cir. 1893),* rev'd, *166 U.S. 290 (1897).*

n78 As a result, the Interstate Commerce Commission approved of various joint running agreements

such as the *Trans-Missouri Freight Association. See 12 ICCAnn. Rep. 10-16 (1898);* Hovenkamp, supra note 6, at chs. 12, 13. The illustrious judge, legal scholar, and then Chairman of the ICC, Thomas M. Cooley, wrote:

> It is the refusal to join with other roads in making rates, or the demand of an unreasonable share of a joint rate when one is made;.., it is the refusal to unite in through bills of lading at agreed rates, or to receive for transportation of persons the tickets that have been given by other roads .... The evils in railroad service nearly all find their origins here. •.. If a rate-sheet [referring to published tariffs of freight charges that the railroads promulgated] affected only the road itself and its customers, [the setting of rates] would in a great many cases be of local importance only and other roads not directly competing with the road making it need not concern themselves specially with its being put in force• But so inextricably are the railroads of the country intermingled in interest; in so many ways do they form routes from business center to business center; from the lakes to the gulf and from ocean to ocean; so easy is it for almost any seemingly unimportant road to be made a part of some direct or indirect route which shall constitute a great channel of commerce; that any considerable change in the rate-sheets by any one of these five hundred boards is not only likely to affect the business and the ratesheets of the roads which are its immediate rivals, but to reach out also in its influence from road to road in all directions ....
>
> *5 ICCAnn. Rep. 330-332 (1891).*

See also *12 ICCAnn. Rep. 13 (1898)* (expressing approval of agreements that cover "the formation of through lines, the interchange of business, the use of cars, the keeping of mutual accounts, the making of uniform classifications, the establishment of whatever rules may be necessary for the handing of railway traffic.., which are not believed to be in any way obnoxious to the antitrust law.").

n79 See *Cincinnati, New Orleans & Tex. Pac. Rwy. Co. v. I.C.C., 162 U.S. 184 (1896)* (noting that Commission lacked power to set rates initially, but only to correct unjust or discriminatory rates).

n80 Of similar effect is *United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).*

n81 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).*

n82 E.g., Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, *58 Antitrust* L.J. *841 (1990);* Daniel Troy, Unclogging the Bottleneck: A New Essential Facilities Doctrine, *83 Colum. h Rev. 441 (1983);* David Gerger, Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of Essential Facilities, *74 Va. L. Rev. 1609 (1988);* Gregory Werden, The Law and Economics of the Essential Facilities Doctrine, 32 St. Louis U. L.J. (1988); James Ratner, Should There be an Essential Facilities Doctrine? *21 U.C. Davis L Rev. 327 (1988).* See also David Reiffen & Andrew N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly, *33* J.L & *Econ. 419, 434-437 (1990).*

n83 In an earlier state court decision, the court had refused to break up the Association under state corporate law. *State v. Terminal Ass'n of St. Louis, 182 Mo. 284, 81 S.W. 395 (1904).*

n84 "It is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company." *Terminal R.R., 224 U.S at 397.*

n85 *Id. at 400.* "That other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies seems to be conceded." Id.

n86 Counsel for the defendant averred that any railroad who requested an ownership interest would have been given one, but the Court went by the corporate charter, which required unanimous consent. *Id. at 400.* "We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the terminal company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application."

n87 See *Munn v. Illinois, 94 U.S. 113 (1877)* (permitting price regulation of unincorporated grain elevator acknowledged to be bottleneck); *Buddv. New York, 143 U.S. 517 (1892)* (permitting price regulation of grain elevator acknowledged to be monopoly).

n88 On this point, see David Reiffen & Andrew N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly, *33 J.L. & Econ. 419, 434-437 (1990).*

n89 *Terminal R.R., 224 U.S. at 411.*

n90 On the administration of compulsory access decrees, see infra Part IX.

n91 *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 411.*

n92 Baker, supra note 19, at 1025.

n93 *Terminal R.R., 224 U.S. at 407-409.*

n94 *Id. at 407.*

n95 *Associated Press v. United States, 326 U.S. 1 (1945).*

n96 See the district court's opinion, *United States v. Associated Press, 52 F. Supp. 362, 364 (1943).*

n97 *Associated Press, 326 U.S. at 4.*

n98 See the lower court opinion, *52 F. Supp. at 364.*

n99. Id.

n100. Id.

n101 Under the rules, if a newspaper from any town applied for AP membership, it was required to pay an entry fee equal to ten percent of the accumulated assessments that had been paid by all other competing newspapers in the same town since 1900. *Id. at 365.*

n102 Perhaps the most distinguished three judge panel ever assembled: Learned Hand, Augustus Hand, and Leonard Swan.

n103 With Judge Swan dissenting.

n104 See *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918). Under that decision, which contains the historically most important formulation of the rule of reason, virtually everything is relevant. As Justice Brandeis said:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

Id. at 238. For a critique of the "test's" overbreadth and lack of focus, see Hovenkamp, supra note 1, section 5.6b.

n105

That industry [i.e., newspapers] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.

52 F. Supp. at 372.

n106 The exceptions are the small number of newspapers with a national circulation, including the New York Times, Wall Street Journal, Christian Science Monitor, and USA Today.

n107 The degree of cost savings results from the fact that news stories are intellectual property. Common to such property is the fact that fixed costs are an unusually large portion of the cost of the entire product. That is to say, the cost of sending the reporter to cover the inauguration might be substantial. But once the story is written, it can be photocopied, wired, or repeated an infinite number of times at very little incremental cost. In that case, the more newspapers who share the story, the lower the cost per newspaper.

Most manufactured products do not enjoy scale economies of this magnitude. As a result, the savings from joint production are not nearly as large. For example, an automobile plant might have a capacity of 50,000 cars annually. Joint production, such as by GM and Toyota, would produce cost savings up to the point that 50,000 cars were produced, but from that point it would actually cost more to produce additional cars out of the same plant and the venture would have reached its optimal capacity.

n108 *See52F. Supp. at366.*

n109 E.g., Baker, supra note 19, at 1035.

n110 *52F. Supp. at366. However, therewerealso* 20-30much smaller agencies providing various forms ofwire service, *ld. at 368.*

nl 11 See *52 F. Supp. at 366-368.*

n112 See Baker, supra note 19, at 1069.

n113 See generally *52 F. Supp. at 366* (deeming UP and INS to be the only two wire services comparable to AP in terms of size and efficiency).

n114 See generally *52 F.Supp. at 366-367, 371-372. AP*

newspapers accounted for 96% of morning circulation, while LIP accounted for 64%. AP accounted for 77% of total evening circulation, while UP had 65%. The AP staff was larger than the staffs of UP and INS together. AP had more than 250 offices in the United States and abroad, while the other two had about 135. AP's annual operating budget was about $12,000,000. UP's budget was $7,000,000 and INS' budget was $2,600,000. Id.

n115 See Gregory Gordon & Ronald D. Cohen, Down to the Wire: UPI's Fight for Survival 17 (1990).

n116 Id. at 20.

n117 See Baker, supra note 19, at 1071.

n118 However, product differentiation permits multiple firms to survive notwithstanding substantial scale economies. For example, in addition to UPI is Reuters, a successful wire service that services many newspapers, particularly those that are relatively sophisticated in the reporting of political and business news.

nl19 E.g., Baker, supra note 19, at 1068-1074.

n120 That is to say, all the economies that accrue to AP with respect to the first story about the President's inauguration also accrue to it for the second and subsequent stories.

n121 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 589590 (1985).* Some facts are from the lower court opinion. *738 F.2d 1509.*

n122 Whether this fact made Aspen a relevant market capable of being monopolized is dubious, but the market power issue was not before the Court. See Phillip E.

Areeda & Herbert Hovenkamp, Antitrust Law paragraph 518. l h (1994 Supp.).

n123 This very condensed statement of facts ignores that there were originally three firms and that various ticket combinations preceded the joint venture at issue.

n124 Id. at 590.

n125 Id. at 592.

n126 Id.

n127 Id. at 592. In fact, Ski Company's best multi-mountain ticket, which covered all three of its own mountains, sold fewer than half as many as the allAspen four-mountain ticket.

n128 See, e.g., Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law paragraph 736.1 (1994 Supp.).

n129 E.g., *Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986)* (finding that a firm retiring equipment and exiting from a market had no duty to cooperate with rival selling agent), cert. denied, *480 U.S. 934 (1987).* Other cases are collected in Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law paragraph 736.2 (1994 Supp.).

n130 That is to say, the cost to the ski company imposed by any skier relates to the number of times the skier uses the lift, slopes and other facilities needing maintenance or attention. A skier who has a four-mountain ticket cannot make any more trips up the ski lift and down the mountain than a skier who has a ticket covering a single mountain; she simply makes the trips up different lifts and down different slopes. Indeed, the skier with a four-

mountain ticket may actually make fewer trips per day because of the time involved in moving from one mountain to another.

n131 See supra note 130 (suggesting that the costs of giving a four-mountain ticket were no larger than the costs of a three-mountain ticket).

n132 The Coase Theorem suggests that, absent transaction costs, the parties would have continued to participate in the venture by settling on a mutually advantageous division of the profits. Ronald Coase, The Problem of Social Cost, 3 J.L. *& Econ. 1 (1960).*

n133 For example, a shoe store that sold shoes in pairs would surely have a market share more than twice as large as a shoe store precisely half the size that sold only left shoes.

n134 Since the litigation Skiing Co. & Highlands have merged. The new firm, which now controls all four mountains, also continues to offer a four-mountain ticket. Promotional Brochure, Aspen Skiing Co., 1994-1995 [on file with author].

n135 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D.Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994). See* infra Part IV.B.-C.

n136 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).* See supra Part III.C.

n137 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).* See supra Part III.A.

n138 *Associated Press v. United States, 326 U.S. 1 (1945).* See supra Part III.B.

n139 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994).*

n140 But even where the excluded firm is already a member, as in the case of product exclusion, individual members maximize their individual profits, not necessarily those of the venture. See supra text accompanying notes 62-67.

n141 See infra Part VI.B.

n142 This was the outcome of the Aspen Skiing plaintiffs insistence that revenues under the venture be divided in proportion to actual use. See the discussion *of Aspen Skiing supra* text accompanying notes 120-34.

n143 If they could be, the venture could always charge subsequent joiners an entry fee designed to compensate founding members for their risk.

n144 See infra part VI.A.

n145 Of course, many joint ventures, such as research joint ventures, are intermediaries rather than final output sellers: they supply inputs to the member firms. But even these joint ventures can be viewed as sellers of the venture's output to the participating firms.

n146 See, e.g., 6 Phillip E. Areeda, Antitrust Law paragraph 1402 (1986); Hovenkamp, supra note 1, at ch. 6.

n147 E.g., *Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)* (condemning joint venture among farms united by common ownership); *United States v. Topco Associates, Inc., 405 U.S. 596 (1972)* (striking down under per se rule horizontal territorial division among joint venturers who lacked substantial market share in any territory).

n148 E.g., *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).* See supra Part III.A. See also *United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964)* (applying an overly aggressive potential competition theory to strike down a joint venture); *Topco, 405 U.S. 596.*

n149 E.g., George J. Stigler, The Theory of Price (3d ed. 1966).

n150 See Hovenkamp, supra note 1, section 4.1.

n151 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993), 36 F.3d 958 (lOth Cir. 1994).* At the time the litigation commenced, Dean Witter was owned by Sears. For an economic analysis of the credit card network, focusing on Visa, see Dennis W. Carlton & Alan S. Frankel, The Antitrust Economics of Credit Card Networks, *63 Antitrust* L.J. *643 (1995).*

n152 Board members were elected by region, but any member with more than 10% of total outstanding VISA cards received automatic membership on the board. *819 F. Supp. at 962.*

n153 *Id, at962.*

n154 We say "presumptively" because the possibility of free riding has not yet been considered. See infra Part VI.A.

n155 Bylaw section 2.06 states: "The corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover Cards or American Express cards, or any other cards deemed competitive .... "*819 F. Supp. at 964.* Under the bylaw, non-VISA members "who develop a successful proprietary card would be prohibited from joining the VISA system and current VISA members would be expelled from the system if they developed such a card." *Id. at 966.*

n156 Initially, VISA excluded MasterCard members, but changed its mind in response to *Worthen Bank & Trust Co. v. Nat'l Bankamericard, Inc., 345 F. Supp. 1309 (E.D. Ark. 1972),* rev'd, *485 F.2d 119 (8th Cir.1973),* cert. denied, *415 U.S. 918 (1974),* and a Justice Department opinion seeing no objection to the duality. See *819 F. Supp. at 962.* Further, Diners' Club and Carte Blanche had been grandparented in; banks who issued those cards were also permitted to issue a VISA card.

n157 *819 F. Supp. at 963.*

n158 See *id. at 987 and n.33.* Dean Witter's proposed "Prime Option" VISA contemplated a 25-day grace period for all card holders, thus permitting them to pay their full bill during this period with no interest charge whatsoever. In addition, Dean Witter proposed a low 9.9% rate of interest on the current and the previous month's purchases, and a higher rate of 9.9% plus the Prime Rate on older purchases -- this in contrast to the more general practice of charging the higher rate for all balances not paid within the grace period. Finally, the proposed VISA card carried no annual fee, a provision entitling card holder to skip a payment periodically without impairing their credit standing, and a standard opening credit limit of $3500. Id.

n159 On the relevance of market power and the methods for measuring it, see infra Part V.

n160 For example, if the new entry or new product is Kaldor-Hicks efficient, the new entrant's gains will be large enough so that it can compensate all losers and still have some gains left over. See Richard A. Posner, Economic Analysis of Law 13-16 (4th ed. 1992).

n161 See discussion supra, text accompanying notes 62-67; see also *Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988); United States v. Realty Multi-List, Inc, 629 F.2d 1351 (5th Cir. 1980).* In the case of the real estate multiple-listing service, the more real estate agents engaged in the joint activity of showing a particular house, the more likely a sale and resulting commission. But if the new applicant is a low cost commission cutter, a disproportionately high percentage of new listings would go to it, thus depriving existing members of market share.

n162 In the most typical venture arrangements voting rights are given one to each member, or the members elect a board of directors who votes on all important decisions. Alternatively, venture members may have voting rights in proportion to their ownership interests. For example, if the venture is incorporated and the venturers own shares, they may have one vote per share. See Steven R. Salbu & Richard A. Brahm, Strategic Considerations in Designing Joint Venture Contracts, *1992 Colum. Bus. L Rev. 253 (1992).*

n163 As a general matter, it cannot be shown that individual voting by members of an organization will yield outcomes that can be said to maximize the welfare of the organization as a whole. See Kenneth J. Arrow, Social Choice and Individual Value (2d ed. 1963); Amartya Sen, Choice, Welfare and Measurement 14-15, 142-48 (1982). For

explorations of the meaning and domain of Arrow's Theorem, see Herbert Hovenkamp, Rationality in Law & Economics, *60 Geo. Wash. L Rev. 293 (1992);* Herbert Hovenkamp, Arrow's Theorem: Ordinalism and Republican Government, *75 Iowa L Rev. 949 (1990).*

One can imagine an alternative decision making regime in which venture members bid for the right to innovate within the venture. For example, if Indian Head bid more for the right to introduce its plastic conduit than the steel producers bid for the right to be free of plastic conduit's competition, then plastic conduit would be introduced. In a perfectly functioning market, plastic conduit would win the bid only if venture wide gains exceeded losses. But such a bidding scheme probably does not exist, certainly cannot be assumed, and would certainly be imperfect if it did exist.

n164 Once again, in a zero transaction cost world, the prospective member might be able to pay existing members an entry fee sufficient to cover their anticipated losses. If Dean Witter's entry were efficient, its gains would at least sometimes exceed the losses of existing VISA members, so such a payment would be possible. But when market information is imperfect and transaction costs are high, such payments are unlikely to occur. Further, if the effect of Dean Witter's entry into VISA is to eliminate any collusion or other supracompetitive pricing resulting from other market imperfections occurring in the VISA market, Dean Witter's gains might not be large enough to compensate existing members for their losses, even though its entry is efficient. The remaining gains will accrue to consumers.

But under the AP membership rules, if a newspaper from any town applied for AP membership, it was required to pay an entry fee equal to ten percent of the accumulated

assessments that had been paid by all other competing newspapers in the same town since 1900. See supra note 101. This was almost certainly a transfer payment intended to compensate existing competitor-members for the losses resulting from increased competition that the efficient entry of a competing newspaper would produce.

n165 See generally Benjamin Klein, Vertical Integration as Organization Ownership, 4 J.L. Econ. & Org. 199 (1988); Paul H. Rubin, The Theory of the Firm and the Structure of the Franchise Contract, *21 J.L. & Econ. 223 (1978);* Roger D. Blair & David L. Kaserman, Vertical Integration, Tying, and Alternative Vertical Control Mechanisms, *20 Conn. L. Rev. 523, 529-530, 538-540 (1988).*

n166 See *Williamson, Markets and Hierarchies, supra* note 40.

n167 This explains why state statutes permitting one franchisee to veto the franchisor's decision to create a second franchise close by are generally inefficient, as are state laws restricting franchise terminations. See Frederick H. Dark & Michael S. Weisbach, The Economic Effects of Franchise Termination Laws, *34 J.L. & Econ. 101 (1991);* Thomas M. Pitegoff, Franchise Relationship Laws: A Minefield for Franchisors, 45 Bus. L. 289 (1989); see also J.H. Beales III& T. Muris, The Foundations of Franchise Regulation: Issues and Evidence (George Mason Univ. Law and Economics Working Paper #94-006, 1994).

n168 E.g., *Eliason Corp. v. Nat'l Sanitation Foundation, 614 F.2d 126 (6th* Cir.) (applying rule of reason and upholding standards applied by testing organization), cert. denied, *449 U.S. 826 (1980); Moore v. Boating Indus. Ass'n, 819 F.2d 693* (7th Cir.), cert. denied, *484 U.S. 854 (1987); Sessions Tank Liners, Inc. v. Joor Mfg., 827 F.2d 458 (9th Cir. 1987),* vacated, *487 U.S. 1213 (1988),* on remand, *852 F.2d 484 (9th Cir. 1988).*

n169 See supra text accompanying notes 62-67.

n170 That is, if economies of scale exist and the plants are currently running at capacity, a substantial demand reduction would entail higher costs. See supra text and figures accompanying note 59.

n171 See supra text and figures accompanying notes 59.

n172 *Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1913).* For additional facts, see supra text accompanying notes 68-70.

n173 See *Hartford Fire Insurance, 113 S. Ct. at 2897.* "ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form .... " Id.

n174 See supra text accompanying notes 69-70.

n175 They also allegedly did a third thing that is not relevant here: they got reinsurers such as Lloyds of London to stop writing reinsurance on the broader forms of coverage. Reinsurance is insurance for insurers, which effectively permits them to reduce their own risk exposure. See *113 S. Ct. at 2909, n.23.*

n176 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912);* see supra Part III.A.

n177 *Associated Press v. United States, 326 U.S. 1 (1945).* See supra Part III.B.

n178 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994);* see supra discussion in Part IV.B.-C.

n179 E.g., *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).* See infra discussion in Part V.A.

n180 In the traditional, or cooperative, cartel, the cartel's optimal aggregate output remains the same -- i.e., the monopoly output -- regardless of the number of members; so monopoly profits would simply have to be shared among more firms. In the ease of non-cooperative oligopoly behavior, the price would decline as additional firms entered. See Hovenkamp, supra note 1, section 4.1.

n181 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D.Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994). See* supra text accompanying notes 154-57.

n182 See supra text accompanying note 181.

n183 See 2 Phillip Areeda & Herbert Hovenkamp, Antitrust Law paragraph 373d (rev. ed. 1995).

n184 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958, 967-69 (lOth Cir. 1994).* In many private actions challenging joint venture exclusion, the plaintiff remains a viable firm in the market. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985),* plaintiff firm, who was victorious, lost market share but remained as a rival; *Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988)* (finding no requirement that plastic tube maker be completely ousted from conduit market); *Wilk v. American Medical Ass'n, 895 F.2d 352* (7th Cir.) (finding no requirement that excluded chiropractors be unable to practice their profession), cert. denied, *496 U.S. 927 (1990).*

n185 See *Allied Tube, 486 U.S. 492.* See supra text accompanying notes 62-67.

n186 See generally 2A Phillip E. Areeda, Herbert Hovenkamp & John Solow, Antitrust Law, ch. 5 (rev. ed. 1995).

n187 E.g., *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); United States v. Aluminum Co. of America, 148 F.2d416 (2d Cir. 1945).* See Areeda, supra note 146; Hovenkamp, supra note 1, at ch. 3.

n188 See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993);* Areeda & Hovenkamp, supra note 129, paragraph 711.2.

n189 *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458 (1986).* See also *Nat'! Society of Professional Engineers v. United States, 435 U.S. 679, 692693 (1978)* (purporting to apply rule of reason to condemn ethical canon forbidding competitive bidding); *Goldfarb v. Virginia State Bar, 421 U.S. 773, 778 and n.17, 781-782 (1975)* (suggesting rule of reason treatment for learned professions).

n190 *476 U.S. at 459.*

n191 Alternatively, the Court noted that in two Indiana localities the dentists in the Federation constituted heavy majorities of practicing dentists and that, as a result, of the Federation policy, insurers had difficulty obtaining compliance with their request for x-rays. *Id. at 460.*

n192 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984).*

n193 *468 U.S. at 109.*

n194 *Id. at 110.*

n195 *Id. at 111.* See *546 F. Supp. at 1297-1300.*

n196 *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).*

n197 *472 U.S. at 294* (quoting Lawrence Anthony Sullivan, Handbook of the Law of Antitrust 261-262 (1977)).

n198 *472 U.S. 294.*

n199 *Id. at 295.*

n200 Id. at 296.

n201 The Supreme Court's decision in *FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990),* established this proposition. This decision, which applied the per se rule to an agreement of trial lawyers to withhold representation of indigent criminal defendants until the fee schedule was modified, did not begin with a joint venture that was presumed to have integrative or other efficiency effects.

n202 Id.

n203 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984).*

n204 For example, if the NCAA joint venture agreement included a provision fixing general tuition rates at participating colleges, quick per se condemnation would be in order.

n205 See, e.g., *Montague & Co. v. Lowry, 193 U.S. 38 (1904)* (finding invalid an association of tile dealers that agreed not to sell to non-members).

n206 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).*

n207 On the relationship between persistent price discrimination and market power, see Phillip E. Areeda, Herbert Hovenkamp & John Solow, Antitrust Law paragraph 522 (rev. ed. 1995).

n208 The Lerner Index quantifies market power according to the formula L = (P-MC)/P, where L is the index reading (from zero to one), P is the firm's profitmaximizing price, and MC is the firm's marginal cost at its profit-maximizing price. A perfect competitor's price equals its marginal cost, so the index reads zero. As P becomes very much greater than MC, the index approaches one. For further development see Phillip E. Areeda, Herbert Hovenkamp & John Solow, supra note 207, paragraph 503; Hovenkamp, supra note 1, section 3. la.

n209 See 2A Areeda et al., supra note 146, paragraph 506d.

n210 1992 Horizontal Merger Guidelines, section 1.11, *57 Fed. Reg. 41,552-01, 41,554 (1992).*

n211 Id. section 1.32.

n212 Id. section 3.2. The two year interval measures entry from initial planning by the new entrant to "significant market impact." Id.

n213 See Kenneth G. Elzinga & David E. Mills, Testing for Predation: is Recoupment Feasible?, *34 Antitrust Bull. 869 (1989);* Hovenkamp, supra note 1, sections 8.4, 8.7, 8.8.

n214 For divergent perspectives, see Michael L. Denger and John A. Herfort, Predatory Pricing Claims After Brooke Group, *62 Antitrust* L.J. *541 (1994);* Jonathan B. Baker, Predatory Pricing After Brooke Group: an Economic Perspective, *62 Antitrust L.J. 585 (1994);* Kenneth L. Glazer,

Predatory Pricing and Beyond: Life after Brooke Group, *62 Antitrust* lj. *605 (1994).*

n215 As Judge Easterbrook once noted concerning the Matsushita case, some twenty years of alleged predation could not have been profitable unless the defendants acquired the ability to charge monopoly prices for the indefinite future. Frank Easterbrook, The Limits of Antitrust, *63 Texas L. Rev. 1, 27 (1984).*

n216 Of course, when the joint venture itself is accused of engaging in an exclusionary practice such as predatory pricing, then the reverse is true: predatory pricing is at least as costly for the joint venture as for the individual firm; for in addition to the costs of the predation itself, the venturers must bear the costs of developing and implementing a joint strategy. See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588-589 (1986).*

n217 See supra Part II.B.

n218 *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).*

n219 *Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988).* See supra text accompanying notes 161-85.

n220 The plastic conduit maker, having the lower costs, faces a residual demand curve (computed by taking the supply of steel at any given price as given) from which it computes its profit maximizing price. If the cost curve for steel is horizontal, that price will probably exclude steel from the market altogether, as Figure 4 illustrates. $SS Figure 4 $SE

Ss is the supply (or cost) of steel conduit, while MCp is the cost of plastic. If the plastic conduit maker sets a price

slightly below Ss, it will exclude the steel conduit makers altogether. If its price is any higher, however, it will not be able to limit the amount of steel that is sold, and the steel makers would produce Q, leaving the plastic conduit maker with nothing, notwithstanding its lower costs. This is simply another way of saying that the "residual" demand for plastic conduit, or the demand curve facing the plastic conduit manufacturer taking into account the productive capabilities of the steel conduit manufacturers, is the kinked line P-X-D.

Figure 5 illustrates the outcome if the cost curve for steel is rising. In that case the plastic conduit maker's profit-maximizing price may permit a certain amount of steel conduit to be sold. However, the quantity of steel conduit sold would be reduced dramatically. $SS Figure 5 $SE

In this figure Ss is the supply (or cost) of steel, while MCp is the cost of plastic. Line A-D' shows the "residual" demand for plastic conduit -- that is, the sales of plastic after the steel makers' ability to produce and sell has been taken into account. The Plastic conduit maker would maximize its profits at a price of P', which would permit 0-X units of steel to be sold in the market, and X-Z units of plastic to be sold. The steel makers' loss of output would equal X-Y, and their price would drop from A to P'.

n221 Figure 2, supra note 59, illustrates the consequences for a group of competitive firms whose demand is dramatically reduced. Demand curve D is the demand for steel conduit before plastic enters the market; demand curve D' is the demand for steel conduit after plastic enter. Now, the firms in the market must divide up output Q' rather than output Q. This could mean proportionately reduced output for all, perhaps entailing higher costs from excess capacity or failure to pay fixed costs associated with this excess capacity; it could also entail bankruptcy or plant closure for some firms.

n222 See supra discussion in Part IV.C.

n223 Figure 6 illustrates that the welfare loss from joint venture exclusion does not depend on the absence of competition within the venture. Demand curve D is the demand for steel conduit. Demand curve D', which is higher and to the right, is the demand curve for plastic conduit, or some mixture of plastic and steel. Assuming costs and price equal to MC -- that is, perfect competition -- consumers' surplus equals B-P-C for steel conduit and A-P-D for plastic, or the plastic-steel combination. The welfare loss is the rhombus A-B-C-D.

[SEE FIGURE IN ORIGINAL]

If the steel conduit maker had been a monopolist or cartel, the introduction of a competitively behaving maker of plastic conduit would have even greater effects. Not only would it create the welfare gains in Figure 6 but it would also force the steel monopolist or cartel to behave competitively.

n224 *United States v. E.L du Pont de Nemours & Co., 351 U.S. 377 (1956).*

n225 *Id. at 391.*

n226 That is, insurance coverage of losses that occurred before the policy issued, but that were discovered or for which suit was brought during the policy period.

n227 See *Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1913),* discussed supra text accompanying notes 68-71.

n228 Of course, in the case of insurance, where the product can be reconfigured on short notice, the dominant insurers may have little previous investment at risk of being

lost to a new innovation. In that case, the ability to collude may be their only incentive for keeping the broader insurance coverage off the market. By contrast, the makers of steel conduit may profit from excluding plastic even if they have no ability to collude themselves. They are at risk of losing their investment in steel technology to a rival with a superior product. The same thing generally applies to the excluded innovator whose innovation gives it lower costs than the dominant firms have.

n229 Further, the association does not need to detect every single instance of cheating, but only a substantial number of instances.

n230 E.g., *Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)* (striking down minimum legal fees imposed by bar).

n231 Once BMI obtained the license from individual composers, artists, or other performance right holders, it issued a blanket license permitting any licensee (such as a radio or television station) to play anything in BMI's repertoire, by paying a fee that varied with the station's revenue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 5 (1979).*

n232 See, e.g., *Nat'l Macaroni Mfrs. Assoc., 65 F.T.C. 583 (1964),* affd, *345 F.2d 421, 423 (7th Cir. 1965)* (condemning an agreement by 84 macaroni makers in association to make their product of 50% hard (durum) wheat, and 50% cheaper, soft wheat).

n233 One might also look at such market facts as the size and secrecy of sales transactions, the extent to which firms discounted from their published prices, the sophistication of buyers, and the like. It might also be relevant how many members actually published their price lists in the appendix, or if members felt constrained in any

way to publish them. For example, the threat of collusion would be significantly greater if three out of three manufacturers of double-pole switches published, than if three out of 200 manufacturers of electric wire published.

On industry conditions conducive to collusion, see Areeda, supra note 146, paragraphs 1430-1431; Hovenkamp, supra note 1, sections 4.2-4.6.

n234 A corollary is that one ordinarily combines all brands or product varieties that the venture's members issue. For example, in the Discover/VISA litigation, the district court observed that virtually every issuer of a VISA also issued a MasterCard. Visa's share of the relevant product market, defined as general purpose charge cards, was 45.6% while MasterCard's was 25.4%. (The others were American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%). The court correctly concluded that, for this particular litigation, the market share of the defendant should be reckoned at 71%, or the sum of Visa and MasterCard. That is, to the extent each Visa decision maker also issued a MasterCard, it was acting in its capacity as issuer of both cards. The fact that the rule that was passed issued only from these banks acting in their "VISAissuer" capacity rather than their "MasterCard-issuer" capacity is irrelevant.

The important premise, of course, is that VISA and MasterCard are substitute products. For example, suppose that gasoline and gasohol (which contains 10% ethanol) are regarded by most customers as nearly perfect substitutes, and most gasoline stations sell both. If the relevant market were defined to include both products, any challenge to a joint venture among stations would compute market share by aggregating sales of gasoline and gasohol, even if the rule being challenged applied only to one. By contrast, if two products were not substitutes, sales of the product

unaffected by the venture rule would be excluded. So, for example, the stations' sales of tires would not be taken into account.

n235 *SCFC 1LC, Inc. v. VISA U.S.A., 36 F.3d 958 (1Oth Cir. 1994).*

n236 *Id. at 967-68.*

n237 See supra text accompanying notes 145-47.

n238 The HHI is computed by squaring and then summing the market shares of each firm (or venture) in the market. Suppose, for example, that a market contained two production joint ventures that accounted for 25% of the market each, and 5 individual firms that accounted for 10% each. The HHI would be 252 + 252 + 102 + 102 + 102 + 102 + 102, or 1750. See 1992 Horizontal Merger Guidelines, section 1.51, supra note 210, at 41,558.

In some circumstances, an 1800 I-IHI threshold may be too tolerant. For example, at that level the venture could have a market share on the order of 40%, and a fringe of smaller firms could make up the balance. Such a venture could have substantial room to set price above cost.

n239 Guidelines recently issued by the DOJ and the FTC are somewhat less tolerant. Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, section 4.1, supra note 23, at 41,344 (creating safety zone only where licensor and its licensees collectively account for 20% of relevant market); DOJ and FTC, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Policy on Physician Network Joint Ventures, part A (Sept. 27, 1994) (20% safety zone for physician network joint ventures).

n240 See Baker, note 19, at 1073; Gregory J. Werden, The Law and Economics of the Essential Facilities Doctrine, *32 St. Louis L.J. 433, 473 (1987)* (making the same point with respect to essential facilities).

n241 Contra *SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958 (lOth Cir. 1994)* (accepting free rider argument by citing only the fact that if Dean Witter entered Visa it would have access to Visa's distribution system, which is of course what all Visa issuers access; no explanation of why this constitutes free riding).

n242 See Lester Telser, Why Should Manufacturers Want Fair Trade? *3 J.L. & Econ. 86 (1960);* Hovenkamp, supra note 1, section 11.3a.

n243 On the output effects of free riding by dealers, see Hovenkamp, supra note 1.

n244 E.g., *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984)* (efficient joint venture for repair of rental trucks, but condemning horizontal territorial division agreement; plaintiff had been denied right to open outlet in territory of another member). If the venture is inherently conducive to collusion, of course, judicial destruction of the venture may be the only available solution.

n245 See, e.g, *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994); MasterCard International, Inc. v. Dean Witter, Discover & Co., 1993 W.L 338213 (S.D.N.Y. 1993); Worthen Bank & Trust Co. v. Nat'l Bank Americard, Inc., 485 F.2d 119 (8th Cir. 1973),* cert. denied, *415 U.S. 918 (1974).*

n246 The NFL's refusal to admit a new member is generally justified, not by free rider concerns, but by the fact that a new member does not compete with existing members. See infra text accompanying notes 268-70.

n247 On market share thresholds, see supra text accompanying notes 238-39.

n248 Real estate multiple listing services are joint ventures in which participating realtors share "listing" information showing properties that are for sale, and generally agree that members will be able to show one another's listings and sell them subject to pre-arranged commission splits. A real estate firm excluded from a multiple listing service is effectively limited to showing and selling its own listings. See *In re Florence Multiple Listing Serv., Inc., 110 F.T.C. 493 (1988)* (using a consent decree to forbid multiple listing service from requiring vote on membership and insisting that applicant not compete with the multiple listing service); see *Thompson v. Metropolitan Multi-List, 934 F.2d 1566 (11th Cir. 1991)* (recognizing possible boycott claim); *United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980)* (same), cert. denied, *113 S. Ct. 295 (1992).*

n249 See supra text accompanying notes 62-67.

n250 See *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956, 964 (D.Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994).* See supra note 155.

n251 See supra Part IV.B.-C.

n252 *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993),* rev'd, *36 F.3d 958 (lOth Cir. 1994).* See supra Part IV.B.-C.

n253 *819 F. Supp. at 970.*

n254 *Id. at 963.*

n255 See *id. at 962.*

n256 *Id. at 964.*

n257 *Id. at 963-964.*

n258 "If permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover Cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards." *Id. at 964.*

n259 Once again, the interests of the venture were different from the interests of its individual members. See supra Part IV.B.-C.

n260 E.g., *Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984)* (dealing with a competitor challenge to production venture between rival GM and rival Toyota).

n261 If the cards were merely competitors, such packages would have no value.

n262 See, e.g., *NCAA v. Bd. of Regents of the University of Okla., 707 F.2d at 1161,* affd, *468 U.S. 85 (1984)* (rejecting NCAA's free rider evidence as "sham"; NCAA had control over a "minimum aggregate fee" that television network had to pay for television rights, and thus could reward some teams more than others).

n263 Numerous ventures have solved free riding problems by using membership fees designed to compensate the venture or other venture members for their investment. See, e.g., *United States v. Associated Press, 52 F. Supp. 362, 365 (1943).* See supra text accompanying note 101. See also *Chicago Professional Sports Limited Partnership & WGN v. Nat'l Basketball Ass'n, 961 F.2d 667* (7th Cir.) (rejecting free rider argument when sports league was able to charge teams for promotional services), cert. denied, *113 S. Ct. 409 (1992); General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984)* (rejecting free rider claims involving members' repairs of each other's trucks when they charged for the service).

n264 See Areeda, supra note 146. See also the position taken by the Justice Department in the proposed Intellectual Property Guidelines, section 4.4. "The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary." Supra note 23, at 41,346.

n265 See Hovenkamp, supra note 1, at 54; Herbert Hovenkamp, The Sherman Act and the Classical Theory of Competition, *74 Iowa L. Rev. 1019, 1041-1044 (1989)* (noting that at common law restraints were "reasonable" only if they were no broader than necessary to protect the interest that was entitled to be protected).

n266 For example, in the Visa case the Tenth Circuit accepted the defendant's argument that excluding Discover Card from Visa membership was efficient because it prevented free riding: if Discover were to join Visa and become large enough, it might acquire a seat on Visa's board. In that case Discover might acquire access to Visa's intellectual property that could be used to benefit *Discover SCFC ILC, Inc. v. VISA U.S.A., Inc., 36 F.3d 958 (lOth Cir. 1994).*

n267 Cf. *Nat'l Bancard Corp. (NaBanco) v. Visa U.S.A., 779 F.2d 592* (1 lth Cir.) (upholding fixing of bank interchange fees without serious inquiry into whether there were alternative methods of communicating the fees, such as printing them on the back of the card), cert. denied, *479 U.S. 923 (1988).*

n268 See supra text accompanying note 118.

n269 See *Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983)* (denying a football team the right to join the NFL), cert denied, *467 U.S. 1215 (1984).*

n270 *Los Angeles Mem- Coliseum Comm'n. v. Nat'l Football League, 726 F.2d 1381* (9th Cir.) (disapproving rule requiring 3/4 of League members to approve a current member's request to move its team; prior to amendment, the rule also permitted any team to veto a different team's request to move into that team's home territory), cert. denied, *469 U.S. 990 (1984); North Am. Soccer League v. Nat'l Football League, 670 F.2d 1249* (2d Cir.), cert. denied, *459 U.S. 1074 (1982). Contrast Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983),* cert. denied, *467 U.S. 1215 (1984),* which denied a claim when the franchise applicant was from a town that did not already have an NFL franchise.

n271 *Associated Press v. United States, 326 U.S. 1 (1945);* see supra text accompanying notes 98-101.

n272 See Areeda & Hovenkamp, supra note 129, paragraphs 736.1-736.2 (criticizing the so-called "essential facility" doctrine).

n273 See, for example, the following cases ordered chronologically: *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); MCI Communications Co. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1982£* cert. denied, *464 U.S. 891 (1983); United States*

v. AT&T, 552 F. Supp. 131 (D.D.C. 1982£ affd mem. sub nom. *Maryland v. United States, 460 U.S. 1001 (1983).*

n274 For example, see supra Figure 5 accompanying note 220.

n275 See *Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983),* cert. denied, *467 U.S. 1215 (1984);* accord *Seattle Totems Hockey Club v. Nat'l Hockey League, 783 F.2d 1347* (9th Cir.), cert. denied, *479 U.S. 932 (1986).*

n276 Such a local government could be liable in antitrust under the "state action" doctrine. See 4 Phillip E. Areeda & Donald F. Turner, Antitrust Law paragraph 917, at 85 (1980); and Hovenkamp, supra note 1, section 20.6.

n277 See *City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157 (8th Cir. 1989)* (finding no essential facility violation where plaintiff could economically operate its own system).

n278 *United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912);* see supra text accompanying notes 92-94.

n279 However, for evidence that it was not, particularly for through traffic, see supra text accompanying note 93.

n280 On this requirement, see Hovenkamp, supra note 6, at ch. 10.

n281 *Associated Press v. United States, 326 U.S. 1 (1945);* see supra text accompanying notes 104-18.

n282 E.g., *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)* (manufacturers of complimentary products), cert. denied, *444 U.S. 1093 (1980).*

n283 As is generally the case in professional sports, where teams do not compete for gate receipts.

n284 The Supreme Court failed to see this in *Continental T.V.v. GTE Sylvania Inc., 433 U.S. 36 (1977),* where it suggested that in a vertical restraint rule of reason case interbrand and intrabrand competition must somehow be "balanced" against each other. That is to say, spacing Sylvania dealers further apart was thought to injure intrabrand competition somehow, but it was done for the benefit of interbrand competition. But the Court was confusing "competition" with number of rivals. It certainly didn't mean that vertically imposed location restrictions tended to increase the price of Sylvania's above the competitive level if one looked at brands, but tended to decrease their price if one looked at the entire market for televisions.

n285 *Worthen Bank & Trust Co. v. Nat'l Bankamericard, Inc., 345 F. Supp. 1309 (E.D. Ark. 1972),* rev'd, *485 F.2d 119 (8th Cir.1973),* cert. denied, *415 U.S. 918, 94 S. Ct. 1417, 39 LEd.2d 473 (1974).*

n286 For the history of this change, see *SCFC ILC, Inc. v. Visa U.S.A., Inc., 819 F. Supp. 956, 963,* rev'd, *36 F.3d 958 (lOth Cir. 1994).*

n287 Id.

n288 See *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., 779 F.2d 592* (1 lth Cir.), cert. denied, *479 U.S. 923 (1986);* William F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, *26* J.L. & *Econ. 541 (1981).*

n289 See supra text accompanying notes 109-17.

n290 E.g., Baker, supra note 19.

n291 See supra Part III.B.

n292 See supra text accompanying notes 109-17.

n293 In *SCFC ILC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993)*, rev'd, *36 F.3d 958 (lOth Cir. 1994)*, VISA defended its policy of excluding issuers of competing cards as members by saying that the policy would facilitate the development of rival systems. If VISA really anticipated that the effect of its exclusivity rule would be to encourage the emergence of rival Discover, it would have dropped the rule.

n294 E.g., Baker, supra note 19, at 1004. See also Mary Azcuenaga, Essential Facilities and Regulation: Court or Agency Jurisdiction, *58 Antitrust L.J. 879, 880-886 (1989)*.

n295 See Donald A. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, *75 Harv. L. Rev. 655 (1962)*; and Carl Kaysen & Donald A. Turner, Antitrust Policy 110-119, 266-272 (1959).

Likewise, Judge Wyzanski was probably asking for trouble when he ordered United Shoe Machinery to offer its equipment for sale on terms equivalent to those that it offered upon lease. *United States v. United Shoe Machinery Co., 110 F. Supp. 295, 340, 341, 348-351 (D.Mass. 1953)*, affirmed per curiam, *347 U.S. 521, 74 S. Ct. 699 (1954)*; see also Carl Kaysen, United States v. United Shoe Machinery Corporation: an Economic Analysis of an Antitrust Case 13-16, 75-76 (1956).

n296 See supra Part VI.B.

n297 For these reasons the common law of regulation did not regulate prices, but it did prohibit "unfair

discrimination," which occurred when a natural firm charged different prices for products or services that were manifestly the same. Setting a price is extremely different, but equalizing the playing field is often less so. See Hovenkamp, supra note 6, at ch. 11.

n298 E.g., *Bolt v. Halifax Medical Center, 891 F.2d 810* (1 lth Cir.) (finding that physicians with separate economic interests voted to exclude the plaintiff), cert. denied, *495 U.S. 924 (1990).*

n299 For example, home owners' associations often make admission decisions by voting, but the Fair Housing Act forbids them from discriminating on the basis of race. This thrusts upon the courts the difficult job of determining whether a particular exclusion resulting from a vote was racially motivated. See, e.g., *Robinson v. 12 Lofis Realty, Inc., 610 F.2d 1032 (2d Cir. 1979)* (requiring the lower court to examine the vote of a home owners' association excluding a black applicant, to see if it was motivated by racial bias). No one has seriously suggested either that the race discrimination be permitted or that home owners' associations be forbidden from making decisions by vote. The courts simply must manage the problem.

n300 E.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984)* (finding output reduction was naked restraint); see supra text accompanying notes 192-95; *W. W. Montague & Co. v. Lowry, 193 U.S. 38, 38 (1904)* (finding that an association organized to advance the interests of its members "by frequent interchange of ideas" violated the Sherman Act by refusing to deal with any non-member of the association, or to charge them only full list prices, which were 50% higher than prevailing market prices).

n301 On the more general analysis, see 7 Areeda, supra note 233, paragraph 1511; Hovenkamp, supra note 1, section 5.6c.

n302 See *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458 (1986); Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).*

n303 *FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).*

n304 Even this narrowly stated per se rule seems inconsistent with *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985),* which appeared to assess a market power requirement even for a completely unexplained refusal to deal. But the Court gave the benefit of the doubt to the defendants, and was not willing to infer that the refusal was a simple cartel facilitator merely from the fact that it was unexplained. In any event, the Trial Lawyers decision makes clear that there is still room for per se analysis of refusals to deal used as naked cartel facilitators. *493 U.S. 411.*

n305 See generally Areeda et al., supra note 186, at ch. 5.

n306 Presumptively, 'dismissal seems warranted if the market has a system level HHI of less than 1800, and the share of the market controlled by the venture is less than 25%. See supra text accompanying notes 238-39.

n307 See supra Part VII.

n308 For example, the founding members of an open membership joint venture should be able to charge a fee designed to compensate themselves for entry risks.

n309 One might think of idiosyncratic exceptions, such as the venturers who operate in multiple markets and the applicant who competes in some market other than the one covered by the venture.

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ARTICLE: UNDERSTANDING JUDICIAL REVIEW OF HOSPITALS' PHYSICIAN CREDENTIALING AND PEER REVIEW DECISIONS

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SUMMARY:

... A hospital's organized medical staff plays a vital role in the hospital's mission as a health care provider and also directly affects consumers of the hospital's health care services .... The Meaning of Medical Staff Membership... Second, medical staff membership gives the physician a voice in the operation of the hospital .... A few courts reason that, because the hospital is required by state law to adopt medical staff bylaws and, in some instances, even to have a particular minimum content, the rights provided for in the bylaws cannot legally constitute valid consideration. Not only does state law require medical staff bylaws, but the hospital accrediting body, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), also requires medical staff bylaws and to some extent defines

their content .... Although state law, JCAHO standards, and federal regulations may require adoption of medical staff bylaws, their precise form and content are left largely to the hospital and its medical staff .... Furthermore, the physician who is a member of the medical staff (as contrasted with an initial applicant) actually does have the opportunity to influence the content of the medical staff bylaws .... The Supreme Court of South Dakota held that the unilaterally-adopted bylaws were "null and void," and it concluded that any changes had to be approved by the medical staff in compliance with the two-thirds majority requirement in the original bylaws ....

TEXT:
[*598]

Introduction

A hospital's organized medical staff plays a vital role in the hospital's mission as a health care provider and also directly affects consumers of the hospital's health care services. Two important functions of a medical staff are making credentialing decisions and conducting peer review. Credentialing decisions determine who is granted or retains staff membership and the level of practice privileges the staff member enjoys, n1 Peer review is a broader concept involving review by medical staff members of the quality and effectiveness of services performed by other medical staff members. n2 Although peer review in hospitals occurs in many contexts, the focus of this Article will be a hospital's credentialing and peer review decisions resulting in the denial, limitation, suspension, revocation, or nonrenewal of a physician's medical staff or clinical [*599] privileges and the extent of judicial review of those decisions.

A physician seeking medical staff membership or clinical privileges goes through an application process, n3 During this process, the hospital evaluates the physician's qualifications and background, n4 Ultimately, privileges may be granted or denied. Furthermore, staff members with existing privileges are subject to regular reevaluation, n5 When a hospital's medical staff, through peer review efforts or as a result of other information, becomes aware of health care quality concerns involving an individual staff member, it should investigate the concerns and take any necessary action. Possible actions include limitation, suspension, revocation, or nonrenewal of staff privileges, n6 Such adverse actions involving staff privileges have a direct and potentially devastating impact on the staff member's practice, n7 Frequently, the affected practitioner will exercise whatever administrative or judicial review options are available in an effort to overturn the decision. The issue then becomes the extent to which a court will review a hospital's decision adversely affecting staff privileges.

Part I of this Article identifies the problem and provides its historical background. Part II identifies the competing interests of physicians, hospitals, and the public in the credentialing and peer review processes that influence how courts deal with challenges to credentialing decisions. In Part III, the Article identifies and examines the various legal theories for judicial review of physician credentialing decisions including: constitutional due process, the rule of non-review, breach of contract, fiduciary duty, common law fairness, and statutory review. Finally, in Part IV, the Article concludes that due process review, rooted in constitutional principles in cases involving public hospitals and in contract in cases featuring private hospitals, provides an appropriate framework for judicial review. This due process review should be afforded to both initial applicants and staff members with existing privileges.

I. Hospital Medical Staffs and the Credentialing Process

A. The Hospital-Physician Relationship and the Organization of Medical Staffs

1. Historical Development of the Hospital-Physician Relationship

Until the late nineteenth century, hospitals were usually charitable [*600] institutions providing free health care to the poor. n8 Most of these early hospitals lacked what has become known as self-governing, organized medical staffs, n9 One authority described these pre-twentieth century hospitals as ""boarding houses.., unworthy of the confidence and support of their communities.'" nl0 According to Loyal Davis, they "were conducted in a manner which brought discredit upon the medical profession." nl 1 Prior to the beginning of the twentieth century, a physician performed most of his work outside of hospitals in the physician's office or private individuals' homes n12 and thus, a physician's practice did not require access to a hospital. Paul Starr estimates that in the 1870s as few as two percent of American physicians had hospital privileges, n13 Physicians even performed surgeries in homes, often in the kitchen, n14 Both the public and physicians often held a dim view of hospitals, n15 According to Paul Starr, "before 1900 the hospital had no special advantages over the home, and the infections that periodically swept through hospital wards made physicians cautious about sending patients there." n16

However, with medical advances, particularly in the area of surgery, the demand for hospitals increased substantially. n17 Services became more [*601]specialized as hospitals transformed themselves from asylums for the indigent into "citadels of healing." n18 According to Paul

Starr, "roughly between 1870 and 1910, hospitals moved from the periphery to the center of medical education and medical practice." n19 Starr adds that these hospitals evolved "from refuges mainly for the homeless poor and insane.., into doctors' workshops for all types and classes of patients." n20 As part of the move away from their role as primarily charitable institutions, hospitals began to allow physicians to charge patients for services rendered in hospitals, n21 thus hospital privileges became more important to physicians. With medical advances, "the conscientious physician became increasingly dependent on the diagnostic and therapeutic facilities which only a hospital could provide." n22

As this new demand for hospital services increased, the number of hospitals in the United States exploded, jumping from 178 in 1873, to 4359 in 1909, and to 6719 by 1930. n23 In the face of this rapid expansion, the American College of Surgeons ("ACS") was organized in 1913 with a primary objective to standardize hospital care. n24 Surgeons in particular believed that both hospitals and physicians performing surgeries should meet minimum standard requirements for safe equipment and safe performance of surgeries, n25 Beginning in 1917, the ACS established the voluntary "Minimum Standard" for hospitals, n26 In 1919, the ['602]ACS established the Hospital Standardization Program ("HSP") to carry out its goal of hospital standardization by studying and monitoring hospitals and building on the Minimum Standard. n27 The HSP was the predecessor of what is now known as the Joint Commission On Accreditation of Healthcare Organizations ("JCAHO"). n28 The Minimum Standard stressed self-regulation through organized medical staffs, n29 For instance, it required "that physicians and surgeons privileged to practice in the hospital be organized as a definite medical staff' and "that the medical staff initiate and, with the approval of the governing board of the hospital, adopt rules,

regulations, and policies governing the professional work of the hospital." n30 From 1918 to 1935, largely in response to the ACS's standardization initiative, the percentage of hospitals with organized medical staffs increased from twenty percent to ninety percent of the hospitals surveyed by the HSP. n31

Prior to organized medical staffs and hospital standardization, some "open staff" hospitals allowed nearly any physician - regardless of qualifications - the privilege of admitting and caring for private paying patients in the hospital, n32 [*603] while many "closed staff" hospitals made staff appointments often based on "favoritism rather than skill." n33 Standardization addressed this lack of standards by imposing requirements for membership on the medical staff and by encouraging "collective responsibility for standards among the "open staff' itself." n34 The Minimum Standard required:

That membership upon the medical staff be restricted to physicians and surgeons who are (a) graduates of medicine of approved medical schools, with the degree of Doctor of Medicine, in good standing, and legally licensed to practice in their respective states or provinces; (b) competent in their respective fields; and (c) worthy in character and in matters of professional ethics;.., n35

A central purpose of hospital standardization was to "prevent[ ] hospitals from being imposed upon by incompetent physicians," n36 and, in turn, to protect the public. Early supporters of hospital standardization were motivated not only genuine concern for the quality of care provided to patients, but also the need to assure the public that hospitals were safe and worthy of the public's patronage. JCAHO has continued to emphasize the necessity for independent, self-governing medical staffs at hospitals. The medical staff has "overall responsibility for

the quality of the professional services provided by individuals with clinical privileges, as well as the responsibility of accounting therefore to the governing body." n37 JCAHO's Accreditation Manual for Hospitals contains a chapter with numerous standards governing medical staffs, n38 The influence of JCAHO accreditation requirements, including those governing medical staffs, is considerable. Although JCAHO is a private nonprofit corporation and hospitals are not required to obtain JCAHO accreditation, the great majority of hospitals do seek and receive accreditation, n39 JCAHO accreditation affords substantial advantages to hospitals including eligibility to receive Medicare payments and recognition under state licensing requirements, n40 States, as part of their hospital [*604] licensure regulations, also require the organization of medical staffs and define the staff's role. n41

2. The Meaning of Medical Staff Membership

The medical staff consists of "fully licensed physicians and may include other licensed individuals permitted by law and by the hospital to provide patient care services independently in the hospital." n42 Although this Article will refer primarily to physicians (both medical doctors and osteopathic doctors), n43 hospital staffs, depending upon state law and the hospital's own bylaws, also may include dentists, podiatrists, psychologists, and other health care professionals. n44

[*605] Medical staff membership normally does not create an employment relationship with the hospital, n45 Instead, it represents membership in an organization that affords certain rights and responsibilities. As one court explained:

Staff privileges serve to delimit a doctor's authority to practice in the hospital based upon the doctor's overall competence in his particular field(s) of practice. Staff privileges do not establish an employment contract with the hospital... Rather, the use a doctor makes of his staff privileges depends upon some independent source. In the case of a physician or surgeon, that independent source is typically the operation of his private practice. In the case of a pathologist that source may be some independent contractual arrangement with the hospital.., n46

A physician's relationship with a hospital based solely on staff membership and corresponding clinical privileges lacks the traditional elements of an employment relationship, n47 Perhaps most significantly, the hospital does not direct or control the details of a physician's medical practice, n48 Although the [*606] hospital makes its facilities available to the physician and imposes certain professional standards, n49 the physician is paid directly by individual patients or insurers and independently diagnoses, admits, and prescribes the course of treatment for his or her patients, n50 Conversely, the hospital does not bill patients for the physician's services, pay the physician, provide retirement or insurance benefits for the physician, select the physician's patients, set the physician's schedule, or control or direct the manner in which the physician provides services, n51

The assumption that individual medical staff members act independently and therefore without undue interference from the hospital serves as the foundation for the concept of an organized medical staff. By definition, the medical staff consists of "licensed independent practitioners" who are authorized "to provide care and services without direction or supervision, within the scope of the individual's license and consistent with individually granted clinical privileges." n52

Viewing medical staff members as non-employees of the hospital is consistent with the historical development of modern American hospitals. Over time, hospitals offering charitable care without cost began to rely upon revenue [*607]from private rooms used by patients admitted by private practitioners, n53 These private rooms in many cases were available for patients of "almost any private physician," and "there was no systematic policy in voluntary hospitals toward exercise of controls over the work of private physicians." n54 Although policies and minimum standards were later imposed, the physician has continued to exercise significant autonomy over the care administered to individual patients at the hospital, n55

Of course, a physician who is a member of the medical staff also may be an employee of the hospital, but that employment relationship is created separately, n56 Indeed, in recent years, with the increased pressures toward managed care and vertical consolidation in the healthcare industry, more and more physicians are becoming employees of hospitals, n57 A physician who, in addition to staff membership, also has an employment relationship with the hospital obviously has an employment contract and employment law remedies.

Membership on a hospital medical staff affords important advantages. First, staff membership is a prerequisite for a physician to admit patients to the hospital and provide health care services in the hospital, n58 Individual members of the medical staff are granted specific "clinical privileges" according to their [*608] license, education, training, experience, competence, health status, and judgment, n59 These delineated privileges are authorization for "a practitioner to provide specific care services.., within well-defined limits." n60 Staff membership and clinical privileges are related but separate concepts. The grant of medical staff membership does not assure the grant

of any particular requested clinical privileges, n61 Different staff members are entitled to different clinical privileges; a member of a medical staff who is a radiologist may be granted clinical privileges in radiology but not, for example, in anesthesiology. A physician may have clinical privileges to conduct certain specified surgeries, but not other types of surgeries, n62 Importantly, medical staff members who admit patients must be granted specific privileges to do so. n63 Members of the medical staff are then charged to be "intricately involved in carrying out, and in providing leadership in, all patient care functions conducted by individuals with clinical privileges." n64

Second, medical staff membership gives the physician a voice in the operation of the hospital. This voice transcends the fundamental fact that [*609] individual staff members supervise, direct, and perform the actual health care services provided to patients. The medical staff is an organized, self-governing collective that develops and adopts its own bylaws, rules, and regulations, n65 These staff strictures define the medical staffs role in the hospital. The bylaws establish, among other things: (1) a medical staff executive committee and define its functions; (2) "fair-hearing and appellate review mechanisms for medical staff members and other individuals holding clinical privileges"; (3) "mechanisms for corrective action, including indications and procedures for automatic and summary suspension of an individual's medical staff membership or clinical privileges"; (4) "the medical staffs organization, including categories of medical staff membership"; (5) "[a] mechanism designed to provide for effective communication among the medical staff, hospital administration, and governing body"; and (6) "medical staff representation and participation in any hospital deliberation affecting the discharge of medical staff responsibilities." n66 These provisions assure the medical staff the opportunity to participate in overall hospital operations.

A medical staff may have different categories of medical staff membership, each with different rights and privileges assigned to it. Both JCAHO standards and federal regulations require the identification of these categories and their corresponding qualifications and limitations in the medical staff bylaws, n67 The bylaws use various terms to describe these categories including attending staff, active staff, associate staff, consulting staff, courtesy staff, resident staff, or honorary staff, n68

B. The Credentialing Process - Becoming and Remaining a Member of the Medical Staff

The medical staffs ultimate purpose is to ensure and further the quality of patient care. The medical staff is "responsible to the governing body of the hospital for the quality of all health care provided to patients in the facility and for the ethical and professional practices of its members." n69 The medical staff ['610] shapes and implements admissions standards to the medical staff as well as requirements for clinical privileges, n70 This credentialing process entails "obtaining, verifying, and assessing the qualifications of a health care practitioner to provide patient care services in or for a health care organization." n71 Although the governing body of the hospital also participates in the credentialing process, the medical staff largely defines and controls the process, n72 Under JCAHO standards, "the mechanisms for appointment or reappointment and initial granting and renewal or revision of clinical privileges are approved and implemented by the medical staff and governing body." n73 As part of this process, the clinical departments recommend professional criteria for clinical privileges to the medical staff, n74 Ultimately the final decision to grant or deny staff membership or clinical privileges is made by the governing body of the hospital, but the governing body bases its decision on the recommendation of the medical staff, n75 A

hospital's governing body, usually a board, typically includes lay people, often prominent community members, who likely readily defer to the medical staff's recommendations. In short, the medical staff acts as a gatekeeper and, within certain parameters, effectively controls admission to its membership and grant of clinical privileges.

The medical staffs credentialing responsibility arises in several similar, yet factually distinct, contexts. First, the staff considers new applications for appointment to the medical staff from individuals who do not have current membership. In this initial application process the staff and the hospital consider ['611] information about the applicant's licensure, training, experience, competence, ability, professional ethics, reputation, and health status, n76 Many jurisdictions address the application process by statute and require procedural due process, n77 reasonableness standards and procedures, n78 impose timeframes for consideration of applications, n79 or impose other requirements on the hospital. n80

Second, the staff considers reappointments to staff membership for individuals with current membership. Usually a staff member's appointment is for a one or two year term. n81 Near the end of the term, the staff member goes through a reappointment process to renew staff privileges. In this process the medical staff considers an individual physician's "pattern of performance by analyzing claims filed against the physician, data dealing with utilization, quality, and risk, a review of clinical skills, adherence to hospital bylaws, policies and procedures, compliance with continuing education requirements, and mental and physical status." n82 This required, periodic

assessment results in a regular, systematic review of the competence and qualifications of staff members, n83 If a problem is identified, the hospital may take appropriate corrective measures.

Third, the medical staff considers action involving existing privileges any time problems are identified. The hospital and the medical staff have the responsibility to continuously review and monitor the professional performance of individual staff members and all medical services rendered at the hospital, n84 ['612] They fulfill this responsibility through ongoing utilization review and quality assurance mechanisms whereby the medical staff, through its committees or departments, reviews outcomes and specific cases to determine appropriateness of patient care. n85 If the quality of care provided by an individual staff member is questioned, the medical staff is required to investigate and take appropriate action which might include a recommendation that staff membership or clinical privileges be limited, revised, suspended, revoked, or not renewed, n86 The right of a hospital, upon recommendation of its medical staff, to take immediate action in the interest of patient safety and welfare is universally recognized. JCAHO standards require medical staff bylaws to include "mechanisms for corrective action, including indications and procedures for automatic and summary suspension of an individual's medical staff membership or clinical privileges." n87 State hospital licensing laws and regulations often specifically authorize hospitals to take immediate action when patient safety is jeopardized, n88

II. The Problem: Balancing Competing Interests of Physicians, Hospitals, and the Public

A. The Physician's Interest

A physician has an interest in being able to pursue his or her profession, n89 For the great majority of physicians, this interest requires access to hospital ['613] facilities, n90 That access requires staff membership and appropriate clinical privileges which are granted only by hospitals. In many areas, there may be only one hospital in a community, county, or region. Where there are no competing hospitals, denial or revocation of privileges may effectively prohibit the physician from participating in his or her profession in that community, n91

Even with the existence of competing hospitals, the negative implications of a denial or revocation of privileges remain because an adverse decision can have enormous consequences for the physician both at the hospital taking the adverse action and at other hospitals. Hospitals in the initial application and reapplication process require the physician to disclose any adverse actions taken involving the physician's professional license or privileges at any hospital, n92 Hospitals often contact other hospitals where applicants have previously practiced to verify the information provided by the physician, n93 Denial or revocation of privileges at another hospital alone may prevent the grant of privileges at a different hospital, n94

['614] Hospitals also check with state licensing officials, the National Federation of State Medical Boards Physician Disciplinary Data Bank, n95 and the National Practitioner Data Bank. n96 The Department of Health and Human Services established the National Practitioner Data Bank (hereinafter the "Data Bank") as required by the Health Care Quality Improvement Act (hereinafter "HCQIA" or the

"Act"). n97 The Act, passed in 1986, established a national reporting system to help prevent incompetent physicians from moving from state to state without discovery, n98 To encourage reporting to the Data Bank, HCQIA provides hospitals which comply with its requirements qualified immunity from damages resulting from the hospital's professional review actions, n99 Under HCQIA, a health care entity is required to report to the appropriate state board of medical examiners any "professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days." nl00 The Act ['615] and its implementing regulations provide that "the term "adversely affecting' includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity." nl01

HCQIA, as well as the accompanying regulatory framework, requires the state board to report the information it receives to the Data Bank. n102 In addition to the professional review action information obtained indirectly from hospitals, the Data Bank also collects information about medical malpractice payments on behalf of physicians and actions taken by boards of medical examiners concerning a physician's license, n103 Although the information provided to the Data Bank is confidential, hospitals and others have access to the information under certain circumstances, n104 To enjoy the immunities extended by HCQIA, federal law requires hospitals to check with the Data Bank when a physician applies for staff or clinical privileges and every two years for physicians already on staff, n105 In addition to the strong encouragement of HCQIA, state laws require hospitals to report adverse actions involving a physician's privileges, n106 Failure to comply with these state law requirements may result in fines or loss of the hospital's license. n107

As a result of hospital practices, HCQIA, and state law, adverse action affecting a physician's staff membership or clinical privileges seriously affects a physician's ability to practice at any hospital, n108 In one case, at the invitation of a [*616] community hospital, a physician left his large city practice after ten years and began a practice at the community hospital, n109 After eight years of staff privileges at the hospital, the physician's privileges were summarily suspended, n110 The consequences to his practice were devastating:

The findings of fact show that immediately after his suspension [he] lost 25 percent of his patients, necessitating staff lay-offs at his clinic. Additionally, [he] lost his courtesy privileges at Odessa Hospital, and his application for staff privileges at Moses Lake Good Samaritan Hospital was put on hold until they received additional information on the Adams County suspension. [His] subsequent attempts to enroll in the United States Navy and the United States Air Force Physician Corps were similarly rebuffed for the same reason. In short, the summary suspension effectively deprived [him] of the pursuit of his medical practice. He was forced to take a low paying employment as a resident in training at the University of Southern California Medical School. n111

Because the effect upon a physician is so significant, physicians have an interest in ensuring fairness in the credentialing and peer review process, n112

B. The Hospital's Interest

1. Patient Welfare

The hospital also has an important interest in the credentialing process. Perhaps foremost, the hospital is concerned about the quality of health care services provided

in its facilities. This concern may have several motivations: (1) a genuine desire to fulfill the hospital's fundamental mission; (2) a desire to maintain and enhance the hospital's reputation in the community and among physicians, prospective patients, and the hospital's peers; (3) discharge of a hospital's legally imposed duty; (4) fear of liability to injured plaintiffs; and (5) the hospital's economic viability and ability to attract patients, n113 As noted ['617] later, n114 concern for the quality of health care and ultimately patient welfare, has resulted in great deference by courts to hospital credentialing decisions.

2. Hospital Liability

The hospital's interest in avoiding legal exposure resulting from improper screening or monitoring of medical staff members or, less directly, from improper care provided by medical staff members at the hospital has become increasingly important. Formerly, most hospitals enjoyed immunity from tort liability under the widely-accepted doctrines of charitable immunity n115 or governmental immunity, n116 By the 1940s, however, courts began to explicitly reject the charitable immunity doctrine, rendering hospitals liable for their own negligent acts and the negligent acts of their employees, n117 While a new development in many jurisdictions, allowing liability under these circumstances was by no means a radical move. Charitable immunity was, after all, an exception to the general rule that entities are liable for their own actions and the acts of their employees committed within the scope of the employees' employment, n118

The protection of governmental immunity is applicable, if at all, only to federal, state, county, or municipal hospitals. n119 This immunity persists, but, as ['618] with charitable immunity, the doctrine has substantially eroded, n120 Courts, however, did not stop

with the abrogation or limitation of immunities. Courts increasingly hold hospitals liable for the malpractice of medical staff members - non-employees of the hospital - in various factual contexts and under various theories, n121 A growing number of courts hold hospitals liable for the negligence of emergency room physicians even if those physicians are otherwise independent contractors and not hospital employees, n122 These courts have sometimes relied upon theories of "ostensible" or "apparent" agency, or "agency by estoppel" to bring the cases within the general rule of respondeat superior liability for acts of an agent, n123

Some courts have imposed a more sweeping rule under a "nondelegable duty" theory. Under this theory, where a hospital has a duty imposed by law or otherwise to provide physicians for emergency room care, the hospital is responsible for the quality of care provided by those physicians regardless of whether the physicians are the hospital's agents (employees) or not (independent contractors), n124 This approach removes the necessity to prove actual or apparent authority. In Jackson v. Power, n125 for example, the Alaska Supreme Court found that there was a genuine issue of fact whether the plaintiff [*619]reasonably believed that the physician at issue was the hospital's employee. n126 But, the court adopted the nondelegable duty theory and held the hospital vicariously liable as a matter of law for any malpractice committed by the emergency room attending physician, regardless of the physician's employment status, n127 Martin C. McWilliams and Hamilton E. Russell, III, have noted:

Although nondelegability of medical care has not swept the field, the determination of some courts that hospitals are, even under limited circumstances, subject to traditional nondelegable duty reflects changing perceptions of public policy at the most potent level. As the Ohio

Supreme Court observed in [Albian v. Flower Hospital], the movement is "toward imposing strict liability on hospitals" for medical care of patients, n128

Courts have also imposed liability on hospitals based on the acts of hospital non-employee medical staff members outside of the emergency room context. Some courts have based this expanded liability on the apparent authority doctrine. n129 Hospital liability has also expanded dramatically under the "corporate liability" doctrine. A landmark case adopting this doctrine is Darling v. Charleston Community Memorial Hospital. n130 In Darling, an eighteen year old broke his leg in a college football game and was taken to the defendant hospital emergency room. nl 31 The plaintiff was treated by a physician on emergency call and admitted to the hospital where he remained for several days until he was transferred to another hospital, n132 Ultimately his leg below the knee had to be amputated, n133

Plaintiff brought an action against the physician and the defendant hospital alleging that the hospital committed negligence by allowing the physician to do orthopedic work, not requiring the physician to review operative procedures, failing to adequately supervise the plaintiffs treatment, and not requiring a consultation, n134 The defendant hospital argued that as a corporation it could not [*620] practice medicine and could not control the doctor's treatment of the plaintiff, n135 The court rejected this argument holding that a hospital assumes certain responsibilities for patient care:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment, n136

Numerous courts have followed Darling and adopted this "corporate negligence" or "corporate liability" theory, and imposed liability on hospitals for injuries resulting from the negligence of physicians on hospital medical staffs in some circumstances, n137 In Thompson v. Nason Hospital, n138 the Pennsylvania Supreme Court characterized the theory as imposing liability if a hospital "fails to uphold the proper standard of care owed its patient," and the court identified four distinct duties mandated by the standard of care:

(1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients, n139

Notwithstanding the duties identified in Thompson, several courts have [*621]only discussed the theory in the context of the selection and retention of medical staff members, n140 Courts adopting the corporate liability theory emphasize that they are imposing liability on the hospital for the hospital's own negligence - not the negligence of its non-employee medical staff, n141 Nonetheless, most of the cases necessarily require proof of an underlying negligent act by a physician or other staff member whose treatment (or lack thereof) directly

contributed to the plaintiffs injury, n142 The dissent in Thompson criticized the corporate liability theory as merely a search for deep pockets and an attempt to hold hospitals "liable as guarantors of the quality of care afforded by independent staff members." n143

Professors Kenneth S. Abraham and Paul C. Weiler argue for even greater legal liability for hospitals, n144 They propose a move toward an "enterprise medical liability" system under which hospitals "would be the exclusive bearers of medical liability for all malpractice claims brought by hospitalized patients - regardless of the provider's status as employee, independent contractor, or holder of admitting privileges, and regardless of the site of the provider's malpractice." n145 A hospital's potential liability is real. As one court summarized:

Hospital governing body members have fiduciary duties as directors and under certain circumstances have exposure to personal liability. A hospital itself may be responsible for negligently failing to ensure the competency of the medical staff... by appropriately overseeing the peer review process. Hospital assets are on the line, and the hospital's governing body must remain empowered to render a final medical practice decision which could affect those assets, n146

As the Arizona Supreme Court noted, "if a patient is injured while in a hospital, regardless of who is at fault, the hospital will almost always be joined as a codefendant." n147

[*622] The current trend imposing greater liability upon hospitals for their credentialing decisions and the care provided by their medical staff members results in added pressure on hospitals to make conservative staff credentialing decisions. Hospitals, as a preventative

measure, may turn away candidates with even minor blemishes on their records or in cases where any doubt exists.

3. Economic Credentialing

In addition to quality of care and concerns about potential liability, profitability and economic considerations have also affected credentialing decisions in recent years. According to the definition of the American Medical Association, "the use of economic criteria unrelated to the quality of care or professional competency in determining an individual's qualifications for initial or continuing hospital medical staff membership or privileges" constitutes "economic credentialing." n148 For instance, a hospital may engage in economic credentialing when it decides to enter into exclusive contracts with physician groups to reduce costs, n 149 As part of these exclusive dealings, the hospital may deny privileges to other physicians practicing that specialty without regard to those physicians' competence or abilities. Furthermore, an economically-minded hospital might refuse to renew the privileges of a physician who primarily practices in other competing hospitals and does not admit a certain volume of patients to the refusing hospital. The denial of privileges because the physician has an unfavorable patient mix of private paying patients, patients on Medicare and Medicaid, and charity patients represents another example of this type of credentialing, n150

Despite the American Medical Association's strong opposition to economic credentialing, n151 hospitals who operate under substantial economic pressures [*623]have a strong incentive to consider economic factors at all levels of their operations including credentialing decisions, n152 Some reports have suggested widespread use of economic credentialing, n153 Some jurisdictions permit economic

credentialing in at least some circumstances, n154 For example, Indiana, by statute, allows consideration of "efficient and effective utilization of hospital resources" in credentialing decisions, n155 On the other hand, Illinois, to some extent, has disapproved economic credentialing. An Illinois statute states that: "the Illinois General Assembly finds: (1) That the citizens of Illinois are not served by the inappropriate use of economic criteria in determining an individual's qualifications for initial or continuing medical staff membership or privileges ..... " n156 Significantly, however, the Illinois statute only addresses "inappropriate use" of economic criteria and not any use of economic criteria and does not flatly prohibit economic credentialing. Regardless of these legal reactions, hospitals experience economic pressures and clearly want to control the cost of health care. Economic credentialing is one way to achieve this goal of cost containment. One commentator, Brian Dahl, explains:

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With the advent of cost-containment pressures brought on by diagnostic related groups (DRGs), capitated payments, and other financial risk-shifting payment schemes, hospital executives have found it increasingly necessary to exert control over physicians' use of hospital services. Although hospital executives exert no direct control over physicians' use of hospital services, hospital governing boards do exercise ultimate control over physician privileges. By tying economic considerations to a physician's privileges, the hospital's administrative staff can indirectly exert tremendous influence over service use. n157

In short, quality of care, potential legal liability, and economic factors all affect a hospital's credentialing decisions and must be considered in determining the appropriate scope of judicial review of credentialing decisions.

C. The Public's Interest

In addition to the sometimes conflicting interests of the physician and the hospital, the public's interests in physician credentialing influence judicial decision making. Above all, concern for patient health and safety properly influences court reaction to credentialing challenges, n158 This concern for public safety has resulted in a high level of deference to hospital staffing decisions. The Fifth Circuit explained:

Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance, n159

Other facets of the public's interest in health and safety include the need for widespread availability of quality health care services n160 and the opportunity to choose a physician, n161 In the words of one court, ""both doctors and their [*625] patients can suffer if otherwise qualified doctors are wrongly denied staff privileges.'" n162

Congress and individual states have recognized the public's obvious interest in quality health care. As a result, they have enacted legislation to encourage "peer review" of physicians, n163 "Peer review" is described as "a process by which members of a hospital's medical staff review the qualifications, medical outcomes and professional conduct

of other physician members and medical staff applicants to determine whether the reviewed physicians may practice in the hospital and, if so, to determine the parameters of their practice." n164

Congress, in enacting the Health Care Quality Improvement Act expressly found that effective professional peer review would improve the quality of medical care by discouraging medical malpractice and exposing incompetent physicians, n165 To this end, Congress extended qualified immunity to physicians engaged in peer review to encourage their participation in the process, n166 States also encourage peer review as a matter of public policy, n167 For example, the Illinois Hospital Licensing Act states: "Because the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care providers." n168

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III. Legal Theories for Judicial Review of Credentialing and Peer Review Determinations

A. The Public/Private Dichotomy

1. Constitutional Review of Public Hospital Actions

In an effort to appropriately accommodate the physician's, hospital's, and public's competing interests, courts have developed various theories and approaches applicable to claims seeking judicial review of hospital credentialing and peer review decisions. The distinction between public and private hospitals provided the basis for the first approach that emerged in the early cases. A "public"

hospital is a hospital owned, sponsored, or managed by a governmental entity -whether a federal veteran's hospital, a state university hospital, or a local community hospital, n169 In the words of several early decisions, public hospitals, like other public corporations, "are the instrumentalities of the state, founded and owned by it in the public interest, supported by public funds, and governed by managers deriving their authority from the state." n170 A "private" hospital, on the other hand, "is one that is owned, maintained and operated by a corporation or an individual without any participation on the part of any governmental agency in its control." n171

A public hospital, as an extension of the state, is subject to the limitations imposed by the United States Constitution -in particular, due process and equal protection requirements, n172 Several early decisions applied this constitutional approach holding that public hospitals could not arbitrarily or unreasonably exclude physicians from practicing in them. n173 Actions of private hospitals, on [*627] the other hand, are not subject to constitutional scrutiny, n174

This disparate treatment of public and private actors by the courts is well entrenched in our constitutional jurisprudence. In 1819, Justice Story in Trustees of Dartmouth College v. Woodward, n175 explained the distinction between public and private corporations and illustrated his point by contrasting a hospital operated as a public corporation and a hospital operated as a private corporation, n176 True to the express language of the Fourteenth Amendment, n177 the United States Supreme Court has repeatedly held that the constitutional protections of the Fourteenth Amendment apply only to state action, n178 Justice Rehnquist stated in Jackson v. Metropolitan Edison Co. n179:

In 1883, this Court in the *Civil Rights Cases, 109 U.S. 3,* affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield, n180

In Edmonson v. Leesville Concrete Co., nl 81 Justice Kennedy explained:

The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions... constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This fundamental limitation on the scope of constitutional guarantees "preserves an area of [*628] individual freedom by limiting the reach of federal law." n182

Justice Kennedy continued: "One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." n183

Because many courts treat private hospitals with greater deference, a major issue for several decades was the determination of whether a hospital should be treated as a public or private entity, n184 Plaintiff physicians alleged constitutional protections in connection with actions of nonprofit privately owned and operated hospitals on the theory that such hospitals should be treated as public or "quasi-public" hospitals, n185 They argued that a hospital's charitable work for the public, n186 the receipt of donations from the government whether for construction of facilities or operations, n187 receipt of payments for services rendered from federal, state, or local governments under

Medicare, Medicaid, or other assistance programs, n188 liability exemptions, n189 tax exemptions, n190 and state licensing and regulation, n191 should result in a finding that such hospitals were [*629] public rather than private. The law now appears well-settled that an otherwise private hospital's actions are not state action merely by virtue of the above factors. n192

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2. Nonreview of Private Hospital Actions

Under the traditional view, private hospitals' credentialing decisions generally are subject to limited or no judicial review, n193 Some courts have referred to this rule as the "rule of nonreview." n194 In its broadest articulation the rule is:

[A] private hospital has a right to exclude any physician from practicing therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practicing in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final, n195

The doctrine of nonreview developed in a string of early cases and persists in some form in numerous jurisdictions. n196

Although referred to as a rule of nonreview, this characterization and its seemingly unambiguous quality are misleading. The rule is not a complete bar to review of credentialing decisions and never was considered a complete bar; [*631]instead, the rule is a doctrine of limited review, n197 The seeds for the doctrine can be seen in an

English case dating back to 1687, where, in a single sentence decision, the court held: "[a] mandamus to restore a surgeon to an [sic] hospital was denied; because it is not in the power of the Court, nor is it a publick [sic] office." n198 In the United States, beginning in the late nineteenth century and continuing into the early twentieth century, courts held that a hospital whose business was conducted by a private corporation could impose restrictions which had the effect of excluding certain physicians, n199 The courts came to this result by applying the general corporate law doctrine that if the hospital board acted within its legitimate corporate powers and not in violation of its bylaws, the court would not interfere, n200 One early court also held that a complaining physician had no interest in the charitable trust operating a hospital and therefore had no standing to challenge the board's actions, n201

Two other cases reflecting early application of the doctrine of nonreview are Harris v. Thomas n202 and State ex rel. Wolf v. La Crosse Lutheran Hospital Ass'n. n203 In Harris, the Texas Court of Civil Appeals considered a challenge by an osteopathic doctor who was excluded from practicing in a local hospital, n204 As part of the American College of Surgeons' effort to standardize hospitals, the defendant organized its medical staff and imposed requirements for membership which excluded the plaintiff because he was an osteopath, n205 The court held that a voluntary association may determine qualifications for its membership, n206 In the court's view, membership was a privilege, and the court would not interfere with the association's decision making unless the association's rules were "against good morals or violated the laws of the state." n207 The court concluded, "we believe it to be the right of the sanitarium to refuse business relation with appellant, if it sees proper to do so." n208

[*632] In State ex rel. Wolf, n209 a hospital board without notice, hearing, or explanation, terminated a group of physicians' hospital privileges, n210 The physicians, who were until that time members of the medical staff, alleged that the hospital's actions were inconsistent with the hospital's medical staff bylaws, n211 Refusing to order a writ of mandamus requiring reinstatement of the physicians' privileges, the Wisconsin Supreme Court held that the hospital was a private corporation and its board had the power to exclude physicians from practicing in the hospital, n212 The court's holding, however, was not a general pronouncement of no review but instead was based on the requirements of mandamus. The court held out the possibility that if there were a breach of contract claim, such a claim might proceed in an action for damages or specific performance, n213

Perhaps the leading early case establishing the nonreview rule is Van Campen v. Olean General Hospital. n214 In Van Campen, a private hospital terminated a physician's staff privileges based on what the trial court found to be petty differences between the hospital management and the physician, n215 The New York court reversed the grant of an injunction in favor of the physician and found that the physician was entitled to neither notice nor a hearing, n216 The court disagreed with the lower court's determination that the hospital was a public corporation, n217 The fact that the hospital engaged in charitable work for the public, received donations and payments from the government in some cases, enjoyed protection from liability, and possessed a tax exemption, did not convert the hospital into a public corporation, n218 The court then held that it should not interfere with the internal decisions of a private corporation short of illegal or improper conduct by the board jeopardizing the corporation's property, n219

Another early case applying the nonreview rule is Strauss v. Marlboro County General Hospital. n220 In Strauss, the South Carolina Supreme Court in a brief opinion affirmed the dismissal of a claim challenging rules that excluded a physician from practicing surgery in the hospital. n221 The court held that the [*633] hospital was a private corporation. n222 The court's conclusion that the hospital was a private institution was dispositive because the parties conceded that if the hospital was private, the action would fail. n223

Other cases followed the Van Campen court, n224 In Hughes v. Good Samaritan Hospital, n225 a hospital barred a physician from performing surgeries, n226 The Kentucky Court of Appeals held that the hospital was a private institution and, in the exercise of its reasonable discretion, had the right to exclude physicians from practicing in it. n227 The court did note that the hospital had not acted for an arbitrary or capricious reason, n228

Similarly, in Levin v. Sinai Hospital of Baltimore City, n229 the Maryland Court of Appeals focused on the public/private hospital distinction in affirming the dismissal of a physician's claim against a hospital for limiting his privileges, n230 The court noted that the hospital's board had both the power to appoint and remove members of the medical staff and proclaimed that "it has never been the policy of the State of Maryland to interfere with the power of the governing body of a private hospital to select its own medical staff." n231

In Natale v. Sisters of Mercy of Council Bluffs, n232 the Iowa Supreme Court denied relief to a physician who had been a member of a private hospital medical staff for ten years but was expelled from the staff the day after he was divorced, n233 The divorce trial was reported in "dally news articles under lurid head lines [sic], and also in radio

broadcasts." n234 The physician was removed from the staff because of the "scandalous divorce case," with no charges against him, no notice, no opportunity to appear or defend himself, and no hearing, n235 In fact, he was not even given notice of his expulsion from the staff and discovered it from a lawyer friend, n236 Even given these facts, the court held that the hospital was a private hospital entitled to conduct its affairs as it saw fit. n237 The court also disregarded provisions of the medical staff bylaws affording procedural rights for expulsion from the staff, finding the bylaws were bylaws of [*634] the staff - not binding on the board, n238

3. Limitations to the Rule of Nonreview

But even these early cases recognized limits to the rule of nonreview. Van Campen noted that a court would intervene in a private hospital's internal decisions "to protect the property of a corporation... but only when corporate powers have been illegally or unconscientiously executed by the board of directors." n239 State ex rel. Wolf pointed to the possibility of a breach of contract action for damages or specific performance, n240 Levin reaffirmed a court's power to grant injunctive relief to a physician who was excluded from a hospital in violation of rights assured in the hospital's own corporate bylaws and constitution, n241 Natale qualified its holding n242 by stating that the private hospital could act as it saw fit, "as long as its acts or omissions were not fraudulent, illegal, ultra vires, intentionally, negligently, or otherwise wrongfully injurious to another. In which event it would be liable as any other private corporation, so offending." n243

A case falling within the parameters of the limitation to the rule of nonreview recognized in these cases is Stevens v. Emergency Hospital of Easton, Inc. n244 Stevens, after several years of practicing in the hospital, was denied the right to practice in the hospital, n245 Under the hospital's

constitution, the medical staff included the practitioners of medicine in good standing in the county where the hospital was located, and the hospital's bylaws added some additional qualifications, all of which Stevens satisfied, n246 Several years after the founding of the hospital, a group of physicians attempted to amend the hospital's constitution and bylaws in a manner that would allow them to exclude Stevens. n247 The court held that the amendments were ineffective because of a failure to follow the required notice procedures, and the court therefore enjoined the hospital from interfering with Steven's right to practice at the [*635]hospital. n248

As the law in this area developed, the limitation to the rule of nonreview became increasingly clear. Early cases like Van Campen, n249 Levin, n250 and Natale n251 made no distinction between denial of an initial application for privileges by one not already on the medical staff (sometimes referred to as "exclusion") and revocation, limitation, or failure to renew privileges for existing medical staff members (sometimes referred to as "expulsion"). n252 Each of those cases involved revocation or limitation of previously existing privileges, n253 Later courts, however, have adopted what some courts have characterized as an "exception" to the general rule of nonreview applicable to cases involving limitation of existing staff membership or privileges, n254 This refinement of the rule allows limited judicial review of a decision to revoke, suspend, restrict, or refuse to renew staff membership or clinical privileges in order to ensure that the hospital complied with the procedures set forth in its medical staff bylaws, and to determine whether the process afforded by the bylaws themselves afforded fair process, n255 Under this approach, a private hospital's decision to deny staff membership to a new physician applying for staff membership is not subject to [*636] judicial review, but a decision affecting a physician's existing hospital staff membership or clinical

privileges is subject to limited judicial review. This evolution of the rule is better viewed as resulting in two separate and distinct rules rather than a general rule and its exception. Characterization as a general rule and its exception is misleading because the exception - far from being the unusual or rare case - applies frequently, n256

Permitting limited judicial review in cases involving a physician's existing staff or clinical privileges may be no more than application of the limitation intimated in the early cases. A physician who enjoys a preexisting relationship with the hospital and is a member of the hospital's medical staff may have certain contractual or other rights afforded by the hospital's and medical staff's internal rules which the courts will enforce, n257 In Van Campen, the court relied in part upon the fact that no provision in the bylaws required a hearing prior to removal or suspension, n258 possibly implying a different result if the bylaws did require such a hearing, n259 Levin recognized: "In Maryland a court of equity may properly grant injunctive relief to protect a physician in his right to treat his own patients in a hospital where its constitution and by-laws accord him that right...." n260 In a 1963 case, Shulman v. Washington Hospital Center, n261 a federal district court, in dicta, also recognized the potential for review "in a case in which there is a failure to conform to procedural requirements set forth in [a hospital's] constitution, by-laws, or rules and regulations." n262

The facts in these early cases, however, did not present the issue of whether the hospitals had violated their own medical staff bylaws, and the rule of nonreview prevailed. If that issue had been presented, the dicta implies a possibly different outcome. One problem with this suggestion is the distinction between a hospital's own corporate bylaws and the bylaws of its medical staff. Many courts consider a hospital's medical staff to be a separate,

self-governing, legal entity, distinct from the hospital, n263 and the hospital and the medical staff [*637] have separate bylaws. It is unclear whether the bylaws referred to in Van Campen, n264 Levin, n265 and Shulman n266 would have included the medical staff bylaws. Furthermore, the court in Natale held that the hospital medical staff was distinct from the hospital board and that the hospital board was not bound by the provisions of the medical staff bylaws, n267

Regardless of what the early decisions may have meant, recent decisions still applying the public/private hospital distinction generally do not review challenges to initial applications, but they do allow limited review of actions affecting existing privileges, n268 At least one court refuses to review decisions affecting even existing privileges to determine compliance with bylaws, n269

Significantly, however, the limited review afforded by the rule does not foreclose statutory claims for otherwise improper conduct. For example, although a court may refuse to consider the merits of a credentialing decision, it will consider whether a decision violated a physician's civil rights or antitrust laws. n270 Vigorously adhering to the rule of nonreview, the Michigan Court of Appeals, in Long v. Chelsea Community Hospital n271 explained:

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We decline to articulate a broad principle that a private hospital's staffing decisions may never be judicially reviewed... Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim, n272

The Pennsylvania courts have held that the substance of a private hospital's staffing decisions are not subject to judicial review where the remedy sought is an injunction to have the decision changed, but review is appropriate where the plaintiff seeks only damages under legitimate contract and tort theories, n273 The rule of nonreview, then, is a misnomer and is instead a rule of limited review.

4. Movement Away from the Public/Private Distinction

Some commentators and courts have urged abandonment of the public/private distinction and its replacement with the equivalent of constitutional due process requirements on all hospitals, public and private, n274 One commentator refers to the public/private distinction as "largely fictional" and "more historical than real." n275 Another commentator argues that the distinction between public and private hospitals "is slight" and does "not justify different judicial approaches." n276 She contends that, although private hospitals' actions may not be state action in the constitutional sense, their actions should be subject to review on state common law grounds as a result of private hospitals' exercise of "quasi-governmental authority." n277 These commentators [*639]focus on the consequences adverse actions have on physicians, patients, and the public, an effect unchanged by the hospital's status as public or private.

Of course, a focus on the immediate effect ignores the state action requirement of the Constitution. Whether a lawyer, a teacher, a secretary, or any employee's employment is terminated by a state agency or a private entity, the result to the former employee is the same - she or he has lost a job. Indeed, the private corporation may have acted without due process or arbitrarily, but, as the Supreme

Court has held, the Constitution does not provide a remedy for every private wrong, n278 Courts should not rush past fundamental constitutional requirements to obtain a result.

But the absence of a constitutional remedy does not mean there is no other basis for a remedy, and in fact many courts have moved away from the public/private hospital dichotomy, n279 Some courts rely on a contract theory, n280 Other courts use common law and public policy theories to impose more extensive judicial review, n281 Still other courts look to state statutes that impose new limits on hospitals' staffing decisions and define the scope of judicial review, n282

B. Breach of Contract - It's in the Bylaws

1. Medical Staff Bylaws are a Contract Under Majority Rule

Courts increasingly have relied on a contract theory to allow limited judicial review of hospital credentialing and peer review decisions. Under this view, medical staff bylaws constitute a contract between a physician who enjoys medical staff privileges and the hospital, n283 If the hospital takes action affecting the physician's privileges without following the procedures or requirements outlined by the bylaws, the hospital has breached its contract, n284 This theory is often cited as the basis for reviewing private hospitals' actions affecting existing privileges, n285 In the view of some courts, the theory is limited by the [*640] exclusion/expulsion distinction noted above, n286 and therefore, may not assist a physician without a current relationship with the hospital who is applying for privileges. In the view of these courts, until the physician becomes a member of the medical staff, he or she has no contractual relationship with the hospital and no contract rights under the bylaws, n287

A large majority of courts that have considered the question have held that a hospital's medical staff bylaws are a binding contract between the hospital and its medical staff members, n288 Some courts have taken a more limited position [*641land find that the medical staff bylaws alone are not a contract, but, in the context of the entire relationship between the physicians and the hospital, they are enforceable as part of a larger contractual relationship. n289 A minority of courts have declared that medical staff bylaws are not an enforceable contract, n290 Like [*642] the Iowa Supreme Court in Natale v. Sisters of Mercy of Council Bluffs, n291 a few courts have distinguished between the hospital's own bylaws and the medical staffs bylaws, holding the former contractually binding on the hospital but not the latter, n292

Two early cases adopting the view that medical staff bylaws give rise to a contractual relationship are Joseph v, Passaic Hospital Association n293 and Berberian v. Lancaster Osteopathic Hospital Association Inc. n294 In Joseph, a hospital refused to reappoint a physician to the medical staff and refused to afford him a hearing, n295 The physician complained that the hospital acted in violation of its medical staff bylaws by failing to provide him a hearing and by acting with malice, n296 The court, without analysis on the contract issue, concluded that the physician stated a cause of action "arising out of a breach of a contract between plaintiff and the hospital set out in its constitution and the by-laws of the medical staff." n297 In Berberian, a physician's medical staff privileges were terminated without notice and without opportunity for a hearing, both allegedly in violation of the medical staff bylaws, n298 The Pennsylvania Supreme Court held:

While there can be no doubt that the board of directors of the hospital has authority to deprive a physician of the privileges of the staff, it is equally clear that the board

has agreed to follow certain specified procedures before determining whether to exercise its authority in a matter of a staff member's expulsion from the hospital... When the board of directors approved the staff by-laws, they became an integral part of the contractual relation between the hospital and the members of its staff, n299

[*643] This majority view is consistent with general corporate law which holds that corporate bylaws are contracts between the corporation and its shareholders, n300

Courts finding the existence of a contract have been influenced by concern that if the bylaws were not enforceable, they would be rendered essentially meaningless, n301 One court, borrowing from Shakespeare, stated that failure to find bylaws enforceable in contract would render them merely hortatory - "much "sound and fury, signifying nothing.'" n302 On the other hand, those courts questioning whether the bylaws are a contract usually resort to the traditional elements for an enforceable contract and find one or more elements missing, n303

2. Defining a Contract

A contract broadly defined is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." n304 Professor Joseph M. Perillo, in Corbin on Contracts, prefers the Uniform Commercial Code's definition of a contract: "the total legal obligation which results from the bargain of the parties in fact as found in their language or by implication from other circumstances, as affected by rules of law." n305 Neither definition, however, identifies the facts necessary for ['644]a court to find enforceable rights and duties, and both obviously call for legal conclusions about what the law will enforce.

Speaking very generally, the typical contract n306 requires: (1) parties with capacity to contract, (2) proper subject matter, (3) consideration, (4) a bargain, and (5) manifestation of mutual assent, n307 The manifestation of mutual assent may be demonstrated by an offer and acceptance, n308 The ultimate goal of the law of contracts is "the realization of reasonable expectations that have been induced by the making of a promise." n309

Concerning the requirement of parties with the capacity to contract, the possible parties to the alleged contract are the hospital, the hospital's medical staff, or both, on one side, and the physician on the other. Beyond question, the physician as an individual and the hospital as a business entity have capacity to enter contracts. The medical staff, too, as an unincorporated organization or association of physicians is capable of forming a contract with its individual ['64~] members, n310

Concerning the second requirement, the medical staff bylaws do address a lawful and proper subject matter. They identify the medical staff's purpose; set standards and procedures for admission and reappointment to the medical staff; define rights of various categories of medical staff membership; create an organizational structure; assign responsibilities within the structure; and establish procedures for corrective action, hearings, and appellate review, n311 The subject matter is not only proper but mandated by state law.

3. The Problem of Consideration

a. Consideration in the Bylaws Themselves

The other three elements - consideration, bargain, and mutual assent - have caused some difficulty in the context of medical staff bylaws. The most frequently

identified ground for finding no contract is a perceived lack of consideration. n312 A few courts reason that, because the hospital is required by state law to adopt medical staff bylaws and, in some instances, even to have a particular minimum content, the rights provided for in the bylaws cannot legally constitute valid consideration, n313 As one court explained:

The bylaws cannot be considered a contract per se because there is no mutual exchange of consideration which brought them into existence. The Hospital had the previous obligation to create those bylaws and to develop a procedure for reviewing a doctor's competency... Consequently, because the hospital had the legal duty to develop the bylaws and the procedures therein independently of its association with [the physician], no consideration could have been given for their creation, and.., without consideration, there cannot be a contract, n314

[*646] The Connecticut Supreme Court, in Gianetti v. Norwalk Hospital, n315 went a step further noting that the hospital not only had a legal duty to adopt the bylaws but also had a legal duty to abide by them. n316 According to the court, "if the department of health had not intended that the hospital abide by its medical staff bylaws, then the requirement that it enact such bylaws would be superfluous." n317 The court concluded that a hospital's agreement to abide by the bylaws could not per se constitute valid consideration, n318

Not only does state law require medical staff bylaws, but the hospital accrediting body, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), also requires medical staff bylaws and to some extent defines their content, n319 Similarly, federal regulations governing hospitals participating in Medicare and Medicaid require adoption and enforcement of medical staff bylaws, n320 A

promise to do that which one already has a preexisting legal duty to do is not consideration, n321 Therefore, because the hospital had a preexisting legal duty to adopt and follow its medical staff bylaws, the physician received no additional benefit from the hospital's assurances or promises in the bylaws.

Consider the irony: a physician attempting to enforce the provisions of the bylaws in a contract action (whether through damages or injunctive relief) is barred because the provisions the physician is trying to enforce did not confer any added benefit to the physician. The physician cannot enforce the provisions because they were already required by law. This result turns contract law on its head because the person who allegedly received no benefit cannot enforce the agreement against the party who received benefit but purportedly gave nothing. Unfortunately, the physician has no claim under the state statutes requiring the bylaws either because the hospital did in fact have bylaws and, moreover, the statutes are regulatory in nature and typically do not confer private causes of action, n322

A fuller understanding of the preexisting legal duty contract doctrine suggests a different outcome. The purpose of this doctrine is to prevent the enforcement of promises "obtained by an express or implied threat to withhold performance of a legal duty," because such promises do "not have the [*647] presumptive social utility normally found in a bargain." n323 These concerns are not served by refusing to enforce the bylaws in a contract action. The doctrine as set forth in the Restatement (Second) of Contracts is:

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain, n324

Although state law, JCAHO standards, and federal regulations may require adoption of medical staff bylaws, their precise form and content are left largely to the hospital and its medical staff, n325 For example, Arizona state regulations merely require the medical staff to adopt bylaws and delineate in the bylaws eligibility requirements for medical staff membership and "state the type, purpose, composition and organization of standing committees." n326

The hospital and its medical staff, by their choice of particular procedures and methods to satisfy these legal requirements, exercise their discretion. Many of the specific provisions in the bylaws admittedly satisfy the legal requirements, but their specific details are not required. Hence, the promises may differ from what was required by the duty thereby constituting consideration. Nothing in these regulations prevents hospitals from agreeing to create rights enforceable in favor of physicians, n327 Therefore, bylaws which exceed the minimum standards required under state law satisfy the consideration requirement, n328

b. Consideration Beyond Promises in the Bylaws

Some courts look beyond the bylaws themselves to find consideration from the hospital to the physician. This approach considers all the circumstances of [*645]the hospital/physician relationship to determine whether a contract exists which includes rights under the bylaws, n329 Viewed in this way, when a hospital asks a physician to

agree in writing to be bound by the bylaws, the physician agrees, and the hospital extends privileges to the physician, an exchange of promises occurs, n330 When a physician requests privileges and a hospital extends the requested privileges, each party receives a benefit which exceeds the hospital's preexisting duty to adopt bylaws, n331 After all, the hospital has no duty to extend privileges to a particular physician, n332 With the extension of privileges, the physician is entitled to treat patients at the hospital and utilize hospital facilities; the hospital, on the other hand, receives the opportunity to provide services to the physician's patients, n333 The rights in the bylaws are then part of the hospital's commitment to the physician, n334 In the end, the consideration received by the physician to support the contract is the grant of staff privileges, n335

c. The Physician's Consideration

In Do Hospital Medical Staff Bylaws Create a Contract, n336 authors John Hulston, Donald Jones, and Timothy Gammon take a different view of consideration and argue that the physician provides no consideration to make [*649] the bylaws a binding contract:

What consideration can a... physician claim to have given, or undertaken, to make any statement in the bylaws binding as a contract? Nothing. Normally, the physician does not agree to provide a service for the hospital, does not agree to give the hospital any certain number of patients and has no contractual commitments to the hospital. Physicians should not be able to claim the hospital has any commitment to them.., n337

To the extent that this view focuses on the lack of "mutuality of obligation" n338 as a requirement distinct from consideration, n339 the approach is misguided. According to the Restatement (Second) of Contracts, "if the

requirement of consideration is met, there is no additional requirement of... mutuality of obligation." n340 It is true, however, that an illusory promise - a promise, the performance of which is entirely optional upon the promisor - is not consideration. n341 But even an illusory promise may become valid consideration when it is actually performed, n342 The employment law context provides a close analogy. Where an employer promises "job security through restrictions on the power to terminate the employment, the employee's services provide consideration for a unilateral contract." n343 Since the bylaws restrict the hospital's power to limit privileges, once the physician admits a patient to the hospital, treats patients at the hospital, or otherwise uses the hospital's facilities, [*650] the physician provides consideration through actual performance.

However, even without actual utilization of the hospital, the physician already has provided consideration. A physician is bound by any promises in the bylaws even if the physician is not required to maintain a practice at the hospital, refer any patients to the hospital, or continue an existing practice at the hospital, n344 Normally, a physician at the application stage must agree to be bound by the terms of the medical staff bylaws as a condition for staff membership n345 - regardless of whether the physician actually admits a single patient to the hospital or uses its facilities. Consideration exists because the bylaws require the physician to act in a specific way and forego certain rights.

The very fact that hospitals uniformly require physicians to agree in writing "to abide by the medical staff bylaws" n346 and to "be bound by the terms thereof" n347 is a clear indication the hospitals believe the bylaws contain promises or performance of the physicians, n348 These promises typically include: (1) grant ['651] of broad releases

and immunities from liability (with specified limitations) to the hospital, its medical staff, and others, in connection with evaluation of the application or reapplication and as part of other peer review activities; n349 (2) agreement to attend medical staff meetings; n350 (3) authorization for the hospital to consult with other medical staffs with which the applicant has been associated, and consent to inspection of records and documents necessary for the evaluation; n351 (4) a physician against whom adverse recommendation or decision has been rendered waives rights to a hearing or appellate review by failing to request them within the time limits identified in the bylaw; n352 (5) a physician may waive issues not raised during the original hearing; n353 (6) the applicant has the burden of producing information for evaluation of the application and resolving doubts about qualifications; n354 (7) the applicant has the burden of establishing his or her qualifications and competency for the clinical privileges requested; n355 (8) agreement to "strictly abide by the Principles of Medical Ethics of the American Medical Association"; n356 and (9) participate in the hospital's quality assurance programs, n357 These promises alone are consideration to support a contract, n358

Under this analysis, contract rights extend to applicants seeking staff membership as well as to those physicians who already have existing privileges. When, as part of the application process, the applicant agrees "to be bound by the terms [of the bylaws] without regard to whether or not he is granted membership and/or clinical privileges in all matters relating to consideration of his application," n359 he or she has given consideration.

d. Consideration Not Bargained For

The lack of any bargaining or negotiation between a hospital and a physician over the terms in the bylaws also influences courts that refuse to [*652] recognize the bylaws

as a contract; n360 They reason that the bylaws are not a contract is because a physician has no input in the bylaws and no power to change their terms, n361 Under the Restatement (Second) of Contracts, consideration is a performance or a return promise which "must be bargained for." n362 This bargaining requirement, however, does not require that the parties engage in actual negotiations over the terms. If that were true, any form contract would be invalid, n363 It should be sufficient that the hospital makes promises in the bylaws and promises to consider a physician's application in exchange for the physician's promise to be bound by the bylaws. This exchange of promises is then bargained for and satisfies the consideration requirement; one promise is the inducement for the other, n364 If the physician refuses to be bound, the hospital refuses to extend privileges. Likewise, if the physician disagrees with the provisions in the bylaws, the physician can walk away and not pursue staff membership there.

Furthermore, the physician who is a member of the medical staff (as contrasted with an initial applicant) actually does have the opportunity to influence the content of the medical staff bylaws. Members of the medical staff compile and adopt the bylaws, n365 Thus, individual physicians have the opportunity to vote for or against the bylaws or any changes to them. Although the hospital governing board must approve the bylaws, n366 it does not unilaterally [*653] impose the medical staff bylaws on the medical staff because both the hospital and the medical staff must approve any changes to them. n367

In Saint John's Hospital Medical Staff v. Saint John Regional Medical Center, Inc., n368 a hospital medical staff brought an action against a hospital to obtain a declaration invalidating unilaterally imposed medical staff bylaws, n369 Upon construction of the hospital in 1947, the hospital

proposed medical staff bylaws based on an existing model, n370 Both the medical staff and the hospital adopted the proposed bylaws, n371 Under the adopted bylaws, any amendments required medical staff approval by a two-thirds majority vote. n372 In 1972, the hospital attempted to make changes to the bylaws, but the medical staff refused, n373 Thereafter, the hospital unilaterally adopted new medical staff bylaws. n374 The Supreme Court of South Dakota held that the unilaterally-adopted bylaws were "null and void," and it concluded that any changes had to be approved by the medical staff in compliance with the two-thirds majority requirement in the original bylaws, n375

Some authorities appear to suggest that a hospital may unilaterally change the medical staff bylaws, n376 but these authorities must be considered in context and reviewed critically. Some of the cases may be referring to the hospital broadly, grouping together the actions of both the hospital board and the medical staff, n377 Some cases fail to distinguish hospital bylaws from medical staff bylaws, n378 merely cite unanalyzed arguments by litigants, n379 or are factually suspect in view of state law and accreditation requirements, n380 Ultimately, the [*654] bylaws are not unilaterally imposed because of both the medical staffs participation and the physician's choice to reject medical staff bylaws altogether by leaving the medical staff or declining to join. n381

e. Estoppel as a Consideration Substitute

The bylaws also should be enforceable in the absence of consideration under a theory of promissory estoppel. This theory may be invoked to enforce gratuitous promises which are not supported by consideration but which otherwise would constitute a contract, n382 The reliance element of promissory estoppel may be viewed as supplying the necessary consideration n383 or as a consideration "substitute." n384

The touchstones of promissory estoppel are reliance by the promisee and resulting hardship. The elements of promissory estoppel are often identified as: (1) a promise; (2) reliance by the promisee; (3) the reliance must be of a definite and substantial character; (4) the promisor should reasonably have anticipated the reliance; and (5) enforcement of the promise is necessary to avoid injustice, n385

The staff bylaws set forth appointment procedures, rights to notice of charges and proposed action, hearings, opportunity to present evidence, opportunity for appeal, and other rights, n386 These affirmatively stated rights [*655] should be construed as promises by the hospital to the physician, n387 After all, a reasonable physician would believe that such statements were commitments by the hospital to the physician. For example, if the bylaws state that "when any practitioner receives notice of a recommendation.., that will adversely affect his appointment to or status as a member of the medical staff.., he shall be entitled to a hearing before an ad hoc committee of the medical staff" and that "all hearings and appellate reviews shall be in accordance with the procedural safeguards set forth in this Article VIII to assure that the affected practitioner is accorded all rights to which he is entitled," n388 the physician may reasonably understand

that the hospital is making a promise, and the physician may be expected to reasonably rely upon such a promise.

The reliance is the physician's acceptance of privileges and subsequent activities as a staff member while foregoing other options. The hospital's promises of fair procedure and staff organization induce the physician to follow through with or submit his or her initial application or application for reappointment. If privileges are granted, the physician, in reliance upon those privileges, may establish a practice in the area. In a similar context, courts have discussed the reliance necessary to enforce procedural protections in employee handbooks and have held that "once an employee is aware of a policy, and his sense of job security is enhanced thereby, he need take no action in reliance on the promise except to remain on the job." n389

Finally, the potential hardship to the physician in this situation is obvious; loss of privileges may result in loss of a physician's practice and jeopardize a physician's ability to practice elsewhere, n390

4. Mutual Assent and Intent to Be Bound

A few courts have wrestled with the issue of whether the physician and hospital intended to be bound by the bylaws. n391 Without question, the physician [*656]agrees, usually in writing, to be bound by the medical staff bylaws as a condition of staff membership, n392 Whether the hospital has a corresponding intent to be bound is a closer question. In one case, Garibaldi v. Applebaum, n393 the medical staff bylaws included a provision disclaiming the creation of contractual rights, n394 The Illinois Appellate Court considered and rejected an argument that bylaws did not create contractual rights because the bylaws stated that ""these bylaws do not purport to be a contract between the Medical Staff or any of

its individual members. '" n395 Even when faced with the express provision, the court held that the bylaws created contractual rights, n396 It held that the disclaimer was against public policy and therefore unenforceable, n397

Furthermore, often the medical staff bylaws contain language that the bylaws "shall when adopted and approved be equally binding on the Board of Trustees and the Staff," n398 or that the hospital "shall be guided and governed by rules and regulations consistent with these Bylaws." n399 JCAHO, the hospitals' accrediting entity, recognizes the true essence of medical staff bylaws arising from their creation of "a system of mutual rights and responsibilities between members of the medical staff and the hospital." n400 JCAHO's standards also note that the bylaws are intended to "create a framework within which medical staff members can act with a reasonable degree of freedom and confidence." n401 In view of these requirements, state statutory mandates for the adoption of bylaws, and the accepted purposes for bylaws, courts should hold that bylaws are intended and understood to be binding on both parties.

5. Employee Handbook Analogy

Employee manuals or handbooks are sometimes considered analogous to medical staff bylaws, n402 Traditionally, courts refused to find contract rights in [*ti$7]employee manuals for many of the same reasons some courts now refuse to recognize the bylaws as a contract, n403 First, they argued that no consideration exists, and second, they pointed to an absence of mutuality of obligation, n404 In recent years, however, a large majority of courts have held that employee manuals may create an implied contract, n405 These courts usually rely on the theory of unilateral contract or promissory estoppel to resolve the consideration problem, n406 The Illinois

Supreme Court identified three requirements for enforcement of an employee manual in a contract action:

First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed, n407

Based on this analysis, courts should find that medical staff bylaws create a valid contract. First, the bylaws state the promises and commitments directly and clearly, n408 Second, a physician receives copies of the bylaws and is asked to become acquainted with them. n409 Third, the physician agrees to be bound by the bylaws and accepts appointment to the medical staff if the application is [*6$$]granted. n410

In Thompson v. Saint Regis Paper Co., n411 the Washington Supreme Court held that "once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory." n412 The hospital, through bylaws, announces specific policy and practices and requires physicians to comply. The hospital should not be allowed to treat its commitments as illusory, n413

6. Hospital Bylaws versus Medical Staff Bylaws

As noted earlier, a few courts have distinguished between the hospital's own bylaws and the medical staffs bylaws, holding the former contractually binding on the hospital but not the latter, n414 Under this view, the medical staff is an unincorporated association separate from the hospital itself, n415 Accordingly, it follows that the hospital as a separate party is not bound by the medical staff bylaws, n416 The bylaws would be an agreement between the medical staff collectively and individual physicians. This position, however, ignores the realities of the hospital-medical staff relationship and the essence of the medical staff bylaws.

The symbiotic relationship between the hospital and its medical staff is [*659]unique. The hospital establishes and sponsors its medical staff, n417 The hospital is required by law and for accreditation purposes to have an organized medical staff which is governed by bylaws, n418 This medical staff is a "collaborating organization" responsible to the hospital's governing board, n419 Although the medical staff adopts its own bylaws, the bylaws are not effective until approved by the hospital's board, n420 The medical staff carries out duties delegated to it by the hospital's board, n421

Under JCAHO's standards, the medical staff bylaws intentionally "create a system of mutual rights and responsibilities between members of the medical staff and the hospital." n422 In some cases, the hospital's own bylaws directly incorporate the limitations and rights afforded by the medical staff bylaws, n423 Although separate from the hospital governing board, the medical staff should be considered an arm of the hospital in the context of rights afforded to individual physicians under the medical staff bylaws, n424 Indeed many courts [*660]make no distinction

between hospital and medical staff bylaws and, instead, use the labels interchangeably or consistently refer to "hospital bylaws" when they mean the hospital's medical staff bylaws, n425

7. Consequences of Enforcing Bylaws in a Contract

Courts should hold that medical staff bylaws form a binding contract between the hospital and individual members of its medical staff. To the extent that the bylaws provide rights specific to applicants, applicants too should have enforceable contractual rights, n426 This conclusion is supported by application of contract law principles and sound policy, n427

The hospital and physician exchange promises with the intent to be bound, n428 This contract approach provides a reasonable vehicle for limited judicial review of credentialing and peer review decisions, n429

Some courts that determined the bylaws are not a contract still enforce them in an action for injunctive relief, n430 In Robles v. Humana Hospital ['661] Cartersville, n431 for example, the Northern District of Georgia reasoned that recognition of a contract would create a damage claim that would be contrary to the state's policy of allowing hospitals to choose their medical staffs, n432 But state law requirements mandating the development of bylaws and procedures to protect staff members justified judicial enforcement of the bylaws in an action for injunctive relief, n433 The district court's concern about exposing hospitals to damage claims can be addressed by qualified immunity under federal n434 and state laws n435 and specific provisions in the bylaws themselves, n436 In particular, under the federal Health Care Quality Improvement Act, hospitals which comply with certain requirements enjoy

immunity from damages for their peer review actions, n437 This immunity covers damage claims for breach of contract, including alleged breach of the bylaws, n438 If the immunity provisions do not apply because of the presence of such factors as bad faith, n439 damage claims may be warranted [*662] and necessary to make the physician whole.

A finding that the bylaws are an enforceable contract is not a one way street favoring physicians - hospitals too stand to benefit, particularly from waiver and immunity provisions, n440 In Brinton v. IHC Hospitals, Inc., n441 the Utah Supreme Court held that the express waiver provision of the bylaws bound a physician who therefore had a duty "to take affirmative steps to raise issues in a timely fashion." n442 The physician was "contractually bound to raise any objections during the [peer review] process or relinquish them as waived." n443 Accordingly, alleged procedural violations which the physician failed to raise in his peer review hearings and before the hospital board could not support a cause of action, n444

In Everett v. Saint Ansgar Hospital, n445 the Eighth Circuit enforced an immunity provision and held that a physician's breach of contract claim for suspension and revocation of his privileges was waived, n446 It held:

Even if there was such a violation, however, [the physician] waived his right to sue for a breach of the contract. When he applied for hospital privileges, [the physician] specifically acknowledged that with respect to actions taken for the purpose of achieving and maintaining an acceptable level of patient care "there shall, to the fullest extent permitted by law, be absolute immunity from civil

liability arising from any such act... Such immunity shall apply to all acts... performed or made in connection with this.., health care institution["s] activities related.., to... corrective action." n447

C. Common Law Review: Fiduciary Duty and Fairness

1. New Jersey's Fiduciary Duty Theory

A number of courts have rejected both the public/private distinction and [*663]breach of contract analysis in favor of allowing judicial review of credentialing and peer review decisions based on public policy grounds. These courts recognize a hospital's fiduciary duty, benefiting the public, to make reasonable peer review and credentialing decisions. The New Jersey Supreme Court first recognized this theory in Greisman v. Newcomb Hospital, n448 which serves as the foundation for one public policy theory alternative.

In Greisman, the plaintiff, a graduate of a school of osteopathy, applied for staff privileges at a private hospital, n449 The hospital refused to accept plaintiffs application for admission to the staff because the bylaws required staff members to be graduates of an American Medical Association approved medical school, and this requirement excluded all schools of osteopathy, n450 The hospital first argued that as a purely private hospital its staffing decisions were not subject to judicial review, n451 The court rejected this argument, n452 It questioned the private nature of hospitals generally and the defendant hospital in particular:

[Private hospitals] are private in the sense that they are nongovernmental but they are hardly private in other senses. [The defendant hospital] is a nonprofit organization dedicated by its certificate of incorporation to the vital

public use of serving the sick and injured, its funds are in good measure received from public sources and through public solicitation, and its tax benefits are received because of its nonprofit and nonprivate aspects. It constitutes a virtual monopoly in the area in which it functions and it is in no position to claim immunity from public supervision and control because of its allegedly private nature, n453

The court compared hospitals to other private businesses that have special common law duties, n454 For example, private innkeepers and common carders have a duty to serve "all comers on reasonable terms," and private railroad companies "hold their property "as a quasi-public trust.'" n455 The court also relied on its own earlier precedent striking down a private, nonprofit county medical society's arbitrary membership requirement, n456 The court found that the hospital was dedicated to serve the public and was the only hospital in the area. "Hospitals are operated not for private ends but for the benefit of the public, and.., their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public." n457 The court concluded that the hospital's power to pass on staff membership applications is a fiduciary power held in trust which must be exercised [*664] reasonably for the public good. n458

Under this public policy approach, the judicial inquiry may be more probing than merely ensuring the hospital's compliance with procedures in the bylaws. Instead, the court asks whether the hospital has acted in accordance with its fiduciary duty, and "a court should not hesitate in promoting natural justice to fill any gaps" in "self-serving" bylaws. n459 Indeed in Greisman, the issue was not whether the hospital complied with its bylaws, but whether the bylaws themselves were reasonable, n460 The result of the holding in Greisman, and cases like it, has been the

imposition of an arbitrary, capricious, or unreasonable standard on all hospitals, whether public or private, in connection with their credentialing and peer review decisions, n461 In the words of one court: "The better rule provides that such review be available as to whether the doctor excluded was afforded procedural due process, and as to whether an abuse of discretion by the hospital board occurred, resulting in an arbitrary, capricious or unreasonable exclusion." n462 Several states have followed Greisman's lead. n463 [*665] Although Greisman involved a physician applying for admission to the medical staff, its holding also has been applied to cases involving the revocation or limitation of privileges, n464

These courts suggest that a hospital's credentialing decisions result from the exercise of "fiduciary powers," powers held "in trust," n465 and that the hospital "occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve." n466 A fiduciary relationship, however, should not be found to exist between the hospital, its physicians, as well as the public. The Restatement (Second) of Torts defines a fiduciary relationship as a relationship "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." n467 A fiduciary relationship in the hospital credentialing context does not fit well with the traditional categories of fiduciaries. One authority identified the following typical fiduciary categories:

An attorney is a fiduciary for a client, a corporate director or officer for the corporation or its shareholders, a promoter for the corporation, an agent for the principal, a guardian for the ward, joint venturers for one another, a partner for the other partners, a bailee for the bailor, a securities broker for a customer, a member of a creditor's committee for the creditors, and, in class action lawsuits, the

representative of a class for its members. According to some authorities, a physician or a psychiatrist may be a fiduciary for a patient, an employee for his employer, a stockholder for the other stockholders in a closely held corporation, and a priest for a penitent, n468

The courts should not find a fiduciary relationship between a hospital and a physician excluded or expelled from the hospital's medical staff. The hospital, in [*666] its staffing decisions, acts in its own interests and does not purport to act primarily in the interest of the applicant, n469 Indeed, the physician is the subject of the hospital's scrutiny during the process.

A closer question is whether a fiduciary relationship might exist between a hospital and the public. In short, does the hospital in making credentialing decisions consider primarily its own interests or the interests of the public? n470 In one sense, the public does rely upon hospitals to make staffing decisions and to police the quality of their staff membership. But the public does not entrust hospitals with any confidential information or property, nor does the hospital make decisions on behalf of the public, n471 A hospital's credentialing decisions are made based on the interests of the hospital itself. This self interest is particularly strong in the actions of private for-profit hospitals who, like other for-profit businesses, presumably have their own economic interests foremost in mind. Of course, the hospital's own interests often coincide with the public's interests. But hospital provision of health care services, although unquestionably important to the public, does not make private hospitals fiduciaries to the public, n472 As flexible as the theory of fiduciary duties is, it should not stretch to cover a private hospital's relationship with the general public or physicians applying for privileges.

Assuming a hospital has fiduciary duties to the public, those duties are not implicated by exclusion of a physician from a hospital's medical staff. Any fiduciary duty does not require that a hospital accept into its membership every qualified physician. Exclusion of a physician does not make the existing medical staff less safe or endanger the public. The hospital has not misused any property of the public or any confidential information entrusted to it by the public. The public has not been misled or deceived. Even if the public is wronged, n473 any liability for the breach would be to the public - not to an offended physician to whom no duty was owed. n474

2. California's Common Law Fair Procedure Theory

The California courts, building on their own precedents and citing Greisman [*667]and its progeny, n475 also have rejected the public/private hospital distinction and a contractual approach, and allow review of hospital credentialing decisions based on the "common law right of fair procedure." n476 The California Supreme Court in Antonv. San Antonio Community Hospital n477 stated the rule "that a physician may neither be refused admission to, nor expelled from, the staff of a hospital, whether public or private, in the absence of a procedure comporting with the minimum common law requirements of procedural due process." n478 Other California decisions have made clear that the right afforded is not constitutional due process, but a common law right of fair procedure, though the distinction is of little consequence, n479 The right of fair procedure is flexible, but at a minimum [*668] it requires "adequate notice of charges, a reasonable opportunity to respond, and an impartial tribunal" if a hearing is required, n480 Moreover, review is not limited to procedural fairness;

it also allows scrutiny of substantive requirements to determine whether a requirement is "irrational, unlawful or contrary to established public policy." n481

Although the California courts partially erased the public/private hospital distinction by applying procedural due process to public hospitals and common law fair procedure to private hospitals - in substance the same standard n482 -the distinction remained significant as a result of legislation overruling in part the 1977 Antonv. San Antonio Community Hospital n483 decision. The Anton decision required courts to exercise their "independent judgment" in reviewing the factual basis for a hospital board's decision, n484 In 1978, the legislature amended California's mandamus statute, which is the mechanism for seeking injunctive relief from hospital decisions, n485 to specifically limit the courts' scope of review of private hospital board decisions to a substantial evidence standard, n486 This alteration in the mandamus proceedings is significant not only for a claim for injunctive relief, but also for damage claims since a physician cannot seek damages until after a successful mandamus action, n487 Under the substantial evidence standard, the courts ""review the administrative record to determine whether its findings are supported by substantial evidence in the light of the whole record,'" and will uphold the findings "unless [they] are so lacking in evidentiary support as to render them unreasonable." n488 While substantial evidence is the standard of review for factual findings, the courts continue to [*669] conduct an independent review to determine whether fair procedure was afforded, n489 The public/private hospital distinction appears to have receded again with a 1992 amendment to section 1094.5(d), applying the substantial evidence standard to decisions of both private and municipal hospitals, n490

Under California law, a physician whose privileges are denied or withdrawn, before bringing a damage action, must first exhaust the hospital's administrative process in addition to prevailing in a mandamus action to overturn the hospital decision, n491

3. Other Courts' Public Policy Review

Many courts that continue to adhere to the public/private distinction and rely on a breach of contract theory also engage to some degree in a common law public policy judicial review. West Virginia's highest court, expressly relying on breach of contract principles, sets forth this approach:

... the decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair heating procedures, including an impartial tribunal, n492

These courts look beyond merely whether the bylaws were followed; they also consider whether the bylaws themselves afford due process, n493 The West [*670]Virginia court continued, "there are basic, common-law procedural protections which must be accorded a medical staff member by a private hospital in a disciplinary proceeding which could seriously affect his or her ability to practice medicine." n494 In addition, the Illinois Supreme Court explained: "A court, however, will be justified in reviewing a private hospital's actions even where the bylaws are followed if actual unfairness.., is demonstrated in the record." n495

D. State Statutes Define the Scope of Judicial Review

In addition to judicial review based on theories of constitutional due process, contractual rights, or common law fair procedure, state legislatures have addressed the scope of judicial review of hospital peer review decisions. State statutes vary widely, but they generally function in four ways.

1. Statutes Granting Immunity from Damages

Nearly all states have statutes which grant immunity from damages to individuals and entities involved in peer review proceedings in certain circumstances, n496 These provisions provide a qualified immunity from damages for actions taken in good faith, without malice, or under some other standard. An example of such an immunity statute is the Florida statute which provides:

There shall be no monetary liability on the part of, and no cause of action for damages against, any licensed facility, its governing board or governing board members, peer review panel, medical staff, or disciplinary body, or its agents, investigators, witnesses, or employees; a committee of a hospital; or any other person, for any action taken without intentional fraud in carrying out the provisions of this section [i.e. peer review], n497

These immunity statutes are not uniform. Some apply to individuals involved in the peer review process but not to hospitals, n498 Among those statutes which do apply to hospitals, the standards differ. The statutes either adopt an [*671] absolute immunity from damages standard, n499 a

"good faith" standard, n500 a "without malice" standard, n501 or some other standard, n502 Courts have applied these various immunity statutes to dismiss damage claims brought by physicians in numerous cases, n503

2. Statutes Requiring Specific Admissions Criteria, Peer Review Standards, or Due Process Requirements

Some statutes require hospitals to adopt specific admissions criteria, peer review standards, and procedural due process rights either in bylaws or other hospital regulations, n504 These statutory requirements in some instances are detailed, n505 and in others instances general and brief, n506 These requirements may [*672] provide the legal basis for challenges to hospital action and conversely limit a court's review, n507

New York is an example of a state which has adopted such a statute. New York for many years followed the traditional rule of nonreview of private hospital staffing decisions announced in Van Campen v. Olean General Hospital, n508 holding that "denial of staff privileges, for whatever reason or for no reason at all, constituted no legal wrong." n509 In 1972, however, the legislature modified the common law by enacting section 2801-b of the Public Health Law which states in relevant part:

It shall be an improper practice for the governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician.., staff membership or professional privileges in a hospital, or to exclude or expel a physician.., from staff membership in a hospital or curtail, terminate or diminish in any way a physician's.., professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to

standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant, n510

A physician alleging violations of this provision, after exhausting the administrative remedies outlined in the statute, may seek an injunction to enforce the provision, n511

[*673] Similarly, Florida initially distinguished between public and private hospitals and followed the rule of nonreview, n512 The Florida legislature in 1975, however, enacted a statute imposing duties on hospitals in connection with their staff membership and peer review decisions, n513 The statute in effect eliminates the public/private hospital distinction as it related to protecting staff privileges and sets forth valid criteria for evaluation of membership application and for limiting existing privileges, n514 These statutory provisions provide the basis for claims by physicians for injunctive relief and potential damages, n515

3. Statutes Specifically Addressing the Process for Judicial Review and Standards to Be Applied

Several statutes expressly identify the process for judicial review of an adverse decision or the standards the courts should apply, n516 A Virginia statute [*674] requires a hospital to provide a physician, in writing, the reasons for denial or termination of privileges, n517 The statute also identifies several impermissible reasons for a denial or termination of privileges, n518 If a hospital violates the statute's requirements, a physician has the right to seek an injunction prohibiting any further violation from the circuit court, n519 An Arizona statute specifically allows "an action for injunctive relief seeking to correct [a hospital's] erroneous decision or procedure." n520 The Arizona statute also determines the court's standard of review: "If the record

shows that the denial, revocation, limitation or suspension of membership or privileges is supported by substantial evidence, no injunction shall issue." n521

The California mandamus statute provides for review of hospital credentialing decisions in the reviewable category of "any final administrative order or decision," and it specifically adopts an abuse of discretion standard for review of hospital decisions, n522 Abuse of discretion is shown if "the findings are not supported by substantial evidence in the light of the whole record." n523 The California statute further identifies the standard necessary to stay the hospital decision while the action is pending, n524 A District of Columbia statute lists a number of factors which may not support an adverse credentialing determination, but it does permit an action in the District's Superior Court to enjoin violations of the statute, n525 Moreover, in a challenge to the hospital's determination, the hospital has the burden to establish that it did not rely on an improper factor, n526 The Colorado and New York statutes specifically permit judicial review following consideration by special administrative boards, n527

4. Statutes Creating Administrative Review

Finally, a statute may create an administrative review board to hear the merits of a physician's claim prior to any court action. Both New York and Colorado have taken this approach, n528 The New York statute permits a court to order injunctive relief against a hospital in accordance with the process identified ['675]in the statute, n529 First, an aggrieved physician must submit a complaint to the New York Public Health Council ("PHC") who investigates the complaint, n530 After its investigation, the PHC may direct the hospital to reconsider its decision or announce its own finding that the complaint lacks merit, n531 Following the PHC review, the physician may then

commence a court action for injunctive relief or damages, n532 The statutory scheme permits the PHC, a body with expertise in the health care field, to consider the merits of the hospital's action before any judicial involvement. This body plays an important mediation role by offering both the physician and the hospital a qualified independent opinion based on the facts. The New York Court of Appeals has observed that "under the conciliating professional influence of the PHC - an impartial third party with vast experience and unparalleled expertise in these cases - disputes between physician and hospital may be resolved expeditiously avoiding costly and protracted litigation." n533 The PHC also plays a fact finding role which will assist in any future litigation on the matter, n534 Under the statute, the PHC's findings of fact are prima facie -though not conclusive - evidence of the facts found in any subsequent judicial proceeding, n535

Similarly, Colorado, by statute, has established the Committee on Anticompetitive Conduct (the "Committee") which reviews claims of unreasonable anticompetitive conduct made by physicians in connection with their privileges or staff membership, n536 The Committee consists of five members, four of whom must be licensed to practice medicine and actively practicing medicine, n537 The statute provides, in relevant part:

Any physician who is the subject of a final action by a governing board, which action results in the denial, termination, or restriction of privileges at or membership in or participation in an organization, and who believes that such action resulted from unreasonable anticompetitive conduct shall have, as his sole and exclusive remedy, [*676] direct review of the record by the committee. Such review shall be limited to the sole issue of whether such final board action resulted from unreasonable anticompetitive conduct. Failure to exhaust this administrative remedy before the

committee shall preclude the right of de novo review on the merits of the issue of unreasonable anticompetitive conduct, n538

The procedure before the Committee is noted in the statute. Ultimately, the Committee may (1) set aside or modify the hospital's action, (2) dismiss the complaint, or (3) remand the case to the hospital board for further review, n539 Following the Committee's review, the action of the Committee may be reviewed by the state's court of appeals, or the action of the hospital may be reviewed de novo on the merits in a district court, n540 Claims not alleging anticompetitive conduct may be raised directly with the court, n541

E. Substantial Compliance with the Bylaws and Abuse of Discretion

If a court decides that review is appropriate, it must determine what level of review it will allow. Courts overwhelmingly agree that a hospital's determination is entitled to great deference, n542 Hospitals exercise their expertise in making staffing decisions, n543 Courts, therefore, are and should be reluctant to second guess those decisions.

Courts that review hospital decisions for compliance with the bylaws almost uniformly apply a substantial compliance standard, n544 Some courts limit review [*677] to compliance with procedural requirements in the bylaws but will not consider the merits of any underlying medical decision, n545 Under this approach, the court will only consider, for example, whether the physician received appropriate notice, had an opportunity to respond to the charges, and whether the process was otherwise fair. n546 Other courts will review the basis for the hospital's decision under either an abuse of discretion, substantial evidence, or

arbitrary and capricious standard, n547 This limited review of the substantive evidence is viewed by some as merely an integral part of the procedural review because "such examination is in recognition that an inherent element of fair hearing procedures is that there be sufficient evidence to support the hospital's decision." n548

Conclusion

Judicial review of credentialing decisions presents difficult questions for physicians, hospitals, and the courts. The courts, using various theories, attempt to balance the competing interests of the physician, hospital, and public, n549 The seeming complexity and variety of approaches found in the cases - characterized by one commentator as a "dismal swamp" n550 - at times is daunting. Nonetheless, [*678] the outcomes of the cases are more uniform than one might expect, n551 In the final analysis, regardless of the underlying theory, most courts review decisions expelling physicians from medical staffs or limiting their privileges to ensure that the physician was afforded what amounts to procedural due process. That due process review for decisions of public hospitals is grounded, at least as a minimum, on constitutional protections, n552 For private hospitals, the due process review is based on contract (the bylaws), fiduciary duty, common law fairness, or statute, n553

In contrast to decisions affecting existing privileges, the courts are sharply split on the question of review of private hospital decisions excluding physicians from medical staffs, n554 Many courts follow the rule of nonreview, but many other courts allow review under fiduciary duty, common law fairness, or statutory theories, n555 Courts are uniformly reluctant to delve into the substantive merits of a physician's claim, n556 However, many courts do venture beyond purely procedural issues

and will consider whether the decision was based on substantial evidence or was not arbitrary or capricious, n557

Most courts will permit injunctive relief to an aggrieved physician, n558 Claims for damages, however, are difficult to maintain and rarely successful. Federal and state immunity statutes, coupled with the considerable deference courts give hospital staffing decisions, n559 set a very high, and in most cases insurmountable, standard. The courts are correct in exercising caution when reviewing hospital staffing determination. They should avoid creating a situation where they are required to make determinations concerning the appropriateness of care or a particular physician's abilities. Hospitals generally, and private hospitals in particular, should be afforded great deference in their internal staffing decisions. Private hospitals, like other private entities, should be permitted to decide who meets their particular standards and needs without judicial second guessing or, as one judge put it, "Monday-morning quarterbacking." n560 Our jurisprudence and governmental system demand respect for the diversity and autonomy of private entities. Judicial intrusion on [*679] common law or public policy grounds without statutory guidance should be minimized. A court may decide a case and never consider the matter again, but a hospital, its staff, and its patients must live with the consequences. Reinstating a physician or merely discouraging a hospital from taking action against a physician because of fear of lengthy and difficult legal proceedings have long-term consequences for both the hospital and the public. Most importantly, public safety may be compromised.

Courts should find that the hospital and medical staff bylaws are contractually binding in favor of both applicants and medical staff members. The elements of a contract are satisfied, n561 and contract law provides a valid, principled basis for judicial review of credentialing

and peer review decisions. Specific statutory provisions also provide a valid basis for judicial review and in some jurisdictions provide a helpful mechanism for administrative review and dispute resolution prior to judicial review. Under these theories, a court can and should determine whether fair procedures were provided to a physician including: notice of the proposed action, notice of the grounds for the proposed action, notice of rights afforded by the bylaws and other regulations, notice of hearings which the physician is entitled to attend, adequate opportunity to prepare a response, opportunity to respond, opportunity to present evidence, a hearing before an unbiased panel, opportunity for appeal, and notice of right to appeal. The court's review should also include consideration of whether the hospital's decision was based on a proper purpose as defined by the bylaws or state law. If the procedures in the bylaws were followed, the hospital's decision should only be overturned if the court finds that the hospital acted arbitrarily and capriciously and contrary to the substantive standards imposed by the bylaws or state law.

FOOTNOTES:

n1. See Joint Commission on Accreditation of Healthcare Organizations, Comprehensive Accreditation Manual for Hospitals: The Official Handbook MS-7 (1999) [hereinafter "JCAHO Manual"] (defining and discussing the credentialing process). See also infra notes 69-88 and accompanying text for a discussion of the credentialing process.

n2. See Susan O. Scheutzow, State Medical Peer Review: High Cost But No Benefit - Is it Time for a Change?, *25 Am. J.L. & Med. 7 (1999)* (defining peer review); Arthur F. Southwick & Debora A. Slee, Quality Assurance in Health Care: Confidentiality of Information and Immunity for

Participants, 5 J. *Legal Med. 343, 344 (1984)* (stating that credentialing process is only one facet of peer review, the broader concept including utilization review, infections review, and review of specific hospital functions).

n3. See generally JCAHO Manual, supra note 1, MS.5 to MS.5.11 at MS 7-10 (discussing application process and requirements). See also infra notes 73-83 and accompanying text for a discussion of the application process.

n4. See JCAHO Manual, supra note 1, MS.5.4, MS.5.4.3 at MS-8 (discussing consideration of professional criteria).

n5. See id. MS.5.11, at MS-10 ("Appointment or reappointment to the medical staff and the granting, renewal, or revision of clinical privileges are made for a period of no more than two years."). See also infra notes 84-86 and accompanying text for a discussion of the reappointment process.

n6. See infra notes 86-88 and accompanying text for a discussion of possible adverse actions.

n7. See infra notes 89-112 and accompanying text for a discussion of the impact of an adverse action.

n8. See Timothy Stoltzfus Jost, The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest, *24 B.C. L Rev. 835, 846 (1983)* (discussing function of hospitals in various periods); Paul Starr, The Social Transformation of American Medicine 147-54 (1949) (discussing nature of hospitals prior to twentieth century). See also, e.g., *Schloendorff v. Society of N. Y. Hosp., 105 N.E. 92, 92 (N. Y. 1914)* (noting charitable nature of New York hospital first formed in 1771). For a discussion of the history of hospitals generally, and the founding and

evolution of the first American hospitals, see Malcolm T. MacEachern, Hospital Organization and Management 1-28 (3d ed. 1957).

n9. See Jost, supra note 8, at 848-49 (noting that percentage of hospitals with organized staffs increased dramatically between 1918 and 1935); Milton I. Roemer & Jay W. Friedman, Doctors in Hospitals: Medical Staff Organization and Hospital Performance 34-36 (1971) (noting lack of systematic policy in early hospitals).

n10. Gary S. Belkin, The Technocratic Wish: Making Sense and Finding Power in the "Managed" Medical Marketplace, 22 J. Health Pol. Pol'y & L. 509, 524 (1997) (quoting John G. Bowman, Standardization of Hospitals (1918)).

n11. Loyal Davis, Fellowship of Surgeons: A History of the American College of Surgeons 63 (American College of Surgeons ed., 1973) (1960).

n12. See Eleanor D. Kinney, Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When is it Appropriate?, 57 Law & Contemp. Probs. 47, 50 (Autumn 1994) ("Until the twentieth century, most health care was provided at home."); Morris J. Vogel, The Transformation of the American Hospital, 1850-1920, in Health Care in America: Essays in Social History 105, 105-06 (Susan Reverby & David Rosner eds., 1979) (stating "even the most difficult surgical procedures were preformed in the home, often in the kitchen").

n13. Starr, supra note 8, at 162. See also, id. at 162 (stating 1907 survey in the Bronx and Manhattan revealed that only about ten percent of physicians had hospital privileges).

n14. See Vogel, supra note 12, at 105 (stating "even the most difficult surgical procedures were performed in the home, often in the kitchen").

n15. See Tom Vitelli, The Story of Intermountain Health Care 15 (1995) (noting popular bias against hospital care).

n16. Starr, supra note 8, at 157.

n17. See Davis, supra note 11, at 62-63 (attributing expansion to growing volume of surgical work); Starr, supra note 8, at 156-57 (same).

n18. See Kinney, supra note 12, at 50. See also Rosemary Stevens, In Sickness and in Wealth: American Hospitals in the Twentieth Century 17 (1989) (discussing the role of hospitals in early twentieth century).

n19. Starr, supra note 8, at 146.

n20. Id.

n21. Id. at 163-64 (stating "rule forbidding physicians to take fees from private patients [in hospitals].., began to die out at the turn of the century"); Stevens, supra note 18, at 30-39 (discussing income from paying patients to nonproprietary hospitals). The shift from charity care to paid services resulted from several factors including the increased cost of hospital services and the increased demand for hospital services. By the early 1900s, a "general crisis in hospital finance had become [ ] widely recognized," and "many facilities began to look toward pay patients as a new source of income." David Rosner, Business at the Bedside: Health Care in Brooklyn, 1890-1915, in Health Care in America: Essays in Social History 117, 121-22 (Susan Reverby & David Rosner eds., 1979).

n22. Roemer & Friedman, supra note 9, at 35. See also Starr, supra note 8, at 163 (noting hospital appointments became more valuable as hospitals became "indispensable for surgical practice and specialization"); id. at 167 (stating that by 1933 only one in six physicians was not affiliated with hospital).

n23. See Jost, supra note 8, at 846 (noting growth in number of hospitals); Bureau of the Census, Historical Statistics of the United States 35 (Robert Burgess, Director 1957). MacEachern puts the 1873 figure at 149 hospitals. MacEachern, supra note 8, at 21. Using a measure of hospital beds per thousand population, the numbers went from 4.7 in 1909 to 7.8 in 1930. See Bureau of the Census, Historical Statistics of the United States 35 (Robert Burgess, Director 1957) (statistic not kept prior to 1909).

n24. See Roemer & Friedman, supra note 9, at 35 (outlining requirements for professional membership in ACS); Jost, supra note 8, at 847 (detailing history of ACS). The ACS was incorporated in 1912, and its first organizational meeting occurred in 1913. Davis, supra note 11, at 70-71, 91.

n25. Davis, supra note 11, at 63, 70.

n26. See Memorandum from JCAHO, Joint Commission History (JCAHO 1/99) (fact sheet available from JCAHO). See Davis, supra note 11, at 204-29 for a discussion of the origins of the ACS and the hospital standardization program,

n27. See Jost, supra note 8, at 848 ("The HSP sought regularly to analyze and audit hospital progress toward compliance with the minimum HSP standards. Like the earlier ACS standards, HSP standards focused on the organization and suitability of the hospitals for physicians.")

(footnote omitted); id. at 848 ("By 1941, the minimum standard had been supplemented by sixteen additional standards....").

n28. The ACS continued its program of voluntary hospital accreditation until 1952 when it officially transferred the HSP to the Joint Commission on Accreditation of Hospitals ("JCAH"). See *Woe v. Cuomo, 559 F. Supp. 1158, 1163 (E.D.N.Y. 1983),* (citing information located in JCAH twenty-fifth anniversary brochure), affd in part, rev'd in part, *729 Fo2d 96 (2d Cir. 1984);* Joint Commission History, supra note 26 (JCAHO 1/99). The ACS, the American Hospital Association, the American Medical Association, the American College of Physicians, and the Canadian Medical Association created the JCAH in 1951. See Joint Commission History, supra note 26 (JCAHO 1/99); Jost, supra note 8, at 851 (providing history of JCAH). In 1987, JCAH changed its name to the Joint Commission on Accreditation of Healthcare Organizations. See Joint Commission History, supra note 26 (JCAHO 1/99) (outlining history of JCAH); Kinney, supra note 12, at 52 n.25 (detailing history of JCAHO).

n29. See MacEachern, supra note 8, at 669-70 (reproducing Minimum Standard).

n30. Id.

n31. See Jost, supra note 8, at 848-49 (discussing effect of ACS standardization efforts). Several cases from the period indicate that many hospitals organized their medical staffs directly in response to the ACS's efforts. See *Newton v. Bd. of Comm'rs, 282 P. 1068, 1069 (Colo. 1929)* (referring to efforts to conform to ACS requirements of hospital standardization concerning privileges to practice in hospital); *State ex rel. Wolf v. La Crosse Lutheran Hosp. Ass'n, 193 N.W. 994, 994 (Wis. 1923)* (stating that hospital in 1919,

"in conformity with the movement initiated by the American College of Surgeons to standardize hospital service" created "the attending staff"); *Harris v. Thomas, 217 S.W. 1068, 1072-74 (Tex. Civ. App. 1920)* (noting that hospital organized medical staff in 1919 as part of larger movement promoted by ACS, American Medical Association and Catholic Hospital Association). But cf. *Lambing v. Bd. of Comm'rs, 263 P. 992, 992 (Idaho 1928)* (noting enactment and then repeal of resolution that hospital should be standardized in accordance with minimum requirements of ACS and form medical staff).

n32. See Jost, supra note 8, at 847 (explaining term "open staff"); Roemer & Friedman, supra note 9, at 34, 36 (noting typical late nineteenth/early twentieth century American hospital was "open staff"); cf. id. at 37 (noting appeals in 1912-1920 literature that medical staff appointments be merit based rather than based on social or political connections or no standards at all).

n33. Stevens, supra note 18, at 53.

n34. Id. at 53. See also id. at 78, 116-17 (discussing impact of national rules on hospitals).

n35. MacEachern, supra note 8, at iv (quoting Minimum Standard II).

n36. *Harris v. Thomas, 217 S. W. 1068, 1072 (Tex. Civ. App. 1920).* In Harris, the hospital's standardization plan "contemplated that the members of said staff shall meet at regular intervals, criticize their practice, and eliminate from their members such as may prove to be incompetent and unfit, the plan likewise contemplated finally specialized work as a basis for competency and fitness." *Id. at 1072.*

n37. JCAHO Manual, supra note 1, MS. 1, at MS-2.

n38. Id. at MS-1 to MS-92.

n39. See Jost, supra note 8, at 845 (stating that eighty percent of all acute care hospitals and "virtually all hospitals with more than twenty-five beds" are JCAH [now JCAHO] accredited).

n40. See Timothy Stoltzfus Jost, Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?, 57 Law & Contemp. Probs. 15, 21 (Autumn 1994) (noting that states rely extensively on Joint Commission Accreditation). See also, e.g., 12 Va. Admin Code 5-410-210 (West, WESTLAW through Aug. 14, 2000) (creating presumption that hospital accredited by JCAHO and with Medicare certification meets licensing requirements).

n41. See, e.g., Ariz. Admin. Code R9-10-214(A) (West, WESTLAW through Dec. 31, 1999) (requiring Arizona hospitals to have organized medical staff); Fla. Admin. Code Ann. r. 59A-3.220(1) (West, WESTLAW through July 1, 2000) (mandating that each hospital have organized medical staff); Kan. Admin. Regs. 28-34-6a(a) (West, WESTLAW through Jan. 1, 1999) (requiring hospitals to have organized medical staff); 12 Va. Admin. Code 5-410-210 (West, WESTLAW through Aug. 14, 2000) (stating that each hospital must have organized medical staff "responsible to the [hospital] governing body" and whose bylaws are approved by the hospital's governing body). Federal regulations require hospitals participating in Medicare and Medicaid to have organized medical staffs. See, e.g., *42 C.F.R. 482.22* (1999) ("The hospital must have an organized medical staff that operates under bylaws

approved by the governing body and is responsible for the quality of medical care provided to patients by the hospital.").

n42. JCAHO Manual, supra note 1, MS. 1.1.1, at MS-2.

n43. See id. MS.6.2, at MS- 11 (defining "qualified physician" to include doctors of medicine and doctors of osteopathy).

n44. See, e.g., *Illinois Psychological Ass'n v. Falk, 638 F. Supp. 876, 880 (N.D. Ill. 1986)* (noting psychologists were serving on medical staffs at several Chicago-area hospitals, but considering department of public health's interpretation of licensing requirement to exclude psychologists from medical staffs), aff'd, *818 F.2d 1337 (7th Cir. 1987); Clemons v. Fairview Med. Ctr., Inc., 449 So. 2d 788, 789-90 (Ala. 1984)* (holding physical therapist might be member of medical staff entitled to protection under the bylaws); *Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805 S. W.2d 756, 760 (Tenn. 1991)* (noting bylaws define "Medical Staff" as licensed physicians, dentists, and podiatrists); *Ogrodowczyk v. Tennessee Bd. for Licensing Health Care Facilities, 886 S. W.2d 246, 251-52 (Tenn. Ct. App. 1994)* (noting that under Tennessee law medical staff members must be graduates of approved programs of medicine, dentistry, osteopathy, podiatry, psychology, nurse midwifery, or optometry); 12 Va. Admin. Code 5-410-10 (West, WESTLAW through Aug. 14, 2000) (defining terms regarding hospital employees, their activities, and hospital facilities as used in this chapter of the Code). See also *Cooper v. Forsyth County Hosp. Auth., Inc., 789 F.2d 278, 279 (4th Cir. 1986)* (upholding bylaws restricting staff membership to physicians and dentists, thus excluding podiatrists); *Wrable v. Cmty. Mem'l Hosp., 501 A.2d 187, 190 (N.J. Super. Ct. Law Div. 1985)* (upholding denial of staff membership to psychiatric nurse), aft'd, *517 A.2d 470 (N.J. Super. Ct. App. Div. 1986); Md. Code Ann., Health-Gen. H*

19-351 (1996) (prohibiting hospitals from denying staff privileges to podiatrists, qualified dentists, and licensed psychologists on a class-wide basis).

Several jurisdictions either have prohibited chiropractors from staff membership or upheld hospital decisions to deny staff membership for chiropractors. See *Petrocco v. Dover Gen. Hosp. &Med. Ctr., 642 A.2d 1016, 1021-27 (N.J. Super. Ct. App. Div. 1994)* (rejecting chiropractor's claim that hospital's refusal to grant him staff privileges constituted violation of due process, defamation, and conspiratorial conduct); *Cohn v. Wilkes Reg'l Med. Ctr., 437 S.E.2d 889, 891-92 (N. C. Ct. App. 1994)* (finding local statues governing hospitals and health services do not require hospitals to give staff privileges to chiropractors); *Fort Hamilton-Hughes Memorial Hosp. Ctr. v. Southard, 466 N.E.2d 903, 905-06 (Ohio 1984)* (finding that statue which protects doctors from discriminatory granting of staff membership but not chiropractors is not violation of equal protection); *Boos v. Donnell, 421 P.2d 644, 647 (Okla. 1966)* (finding hospital has no duty to grant hospital privileges to chiropractors); *Samuel v. Curry County, 639 P.2d 687, 689 (Or. Ct. App. 1982)* (concluding Oregon law does not require grant of hospital privileges to chiropractors because they are not licensed, practicing physicians); *Ogrodowczyk, 886 S. W.2d at 252* (finding local rules precluded hospitals from granting medical staff privileges to chiropractors). See also Fla. Admin. Code Ann. r. 59A-3.217(4)(h) (West, WESTLAW through July 1, 2000) ("nothing contained in the provisions of this section shall require a licensed facility to grant staff privileges to a chiropractor").

n45. See, e.g., *Johnson v. El Paso Pathology Group, P.A., 868 F. Supp. 852, 860 (W.D. Tex. 1994)* ("Having staff privileges at a hospital is not the same as being employed by a hospital."); *Bryant v. Glen Oaks Med. Ctr., 650 N.E.2d 622, 630 (Ill. App. Ct. 1995)* (stating that grant of staff privileges

does not guarantee concurrent employment); *Sullivan v. Baptist Mem'l Hosp.-Golden Triangle, Inc., 722 So. 2d 675, 679 (Miss. 1998)* (observing that staff appointment and clinical privileges do not establish employment contract); *Albain v. Flower Hosp., 553 N.E.2d 1038, 1043 n.5 (Ohio 1990)* ("Physicians with staff privileges have long been considered independent contractors...."), overruled on other grounds by *Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46 (Ohio 1994); Lyons v. St. Vincent Health Ctr., 731 A.2d 206, 210 (Pa. Commw. Ct. 1999)* ("In most cases, doctors with staff privileges are not employees of the hospital...."); *Bryant v. HCA Health Servs. Of No. Tenn., Inc., 15 S. W.3d 804, 809-10 (Tenn. 2000)* ("A hospital usually provides a staffed facility in which a non-employee physician may perform a procedure.").

n46. *Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 267 (8th Cir. 1983);* accord, e.g., *Draghi v. County of Cook, 991 F. Supp. 1055, 1058 (N.D. Ill. 1998)* (finding that doctor's appointment to hospital staff does not create an employment contract), aff'd, *184 F.3d 689 (7th Cir. 1999).*

n47. In determining whether a particular relationship is an employment relationship, courts often have looked to the factors identified in the *Restatement (Second) of Agency 220* (1958). See, e.g., *Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 & nn. 18-30 (1989)* (analyzing whether organization's agreement with artist to produce sculpture is "work made for hire" under Restatement principles); *Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 262-63 (4th Cir. 1997)* (citing Restatement to support notion that doctor under contract with hospital to provide emergency medical services is independent contractor). See also *Restatement (Second) of Agency 2* (1958) (defining master, servant, and independent contractor).

n48. See, e.g., *Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 273 (5th Cir. 1988)* ("The hospital does not direct the manner or means by which [plaintiff physician] renders medical care... Plaintiff physician treated her patients in [defendant hospital] without direct supervision."); *St. Luke's Health Sys. v. State, 884 P.2d 259, 264-65 (Ariz. Ct. App. 1994)* (finding that hospital "did not control the details of [physician's] medical practice"); *Sullivan, 722 So. 2d at 680* ("The Hospital does not control or direct the radiologist or the manner in which he performs his services.").

n49. See, e.g., *Cilecek, 115 F.3d at 261-62* (stating that hospital-imposed regulations relating to professional standards for providing health care did not indicate employment relationship); *Diggs, 847 F.2d at 273* ("While it imposes standards upon those permitted to hold staff privileges, the hospital does not direct the manner or means by which [plaintiff physician] renders medical care.").

n50. See, e.g., *Diggs, 847 F.2d at 273* (noting that physician treated patients without direct supervision); *St. Luke's Health Sys., 884 P.2d at 264* (finding that physician "independently admitted his own patients, diagnosed their conditions, and determined the appropriate manner and means of treatment," and was paid directly by patients or insurers).

n51. See *Alexander v. Rush North Shore Med. Cir., 101 F.3d 487, 493 (7th Cir. 1996)* (finding no employment contract between doctor and hospital because manner in which doctor rendered services was primarily in his own control); *Diggs, 847 F.2d at 272-73* (emphasizing hospital's lack of direct control over doctor's means of providing medical care to patients); *St. Luke's Health Sys., 884 P.2d at 264-65* (finding doctor, not hospital, had right to control details and means of work doctor performed); *State Comm'n on Human Relations v. Suburban Hosp., Inc., 686 A.2d 706, 721 (Md. Ct.*

Spec. App. 1996) (finding hospital does not direct manner of doctor's medical care through grant of staff privileges), vacated on other grounds, *704 A.2d 445 (Md. 1998); Sullivan, 722 So. 2d at 680* (finding that hospital does not direct or control delivery of radiologist's services); *State ex rel. Mississippi Ethics Comm'n v. Aseme, 583 So. 2d 955, 959-60 (Miss. 1991)* (indicating grant of hospital privileges does not normally create employment contract between doctor and hospital). See also *Bender v. Suburban Hosp., Inc., 159 F.3d 186, 191 (4th Cir. 1998)* (noting district court's holding that staff privileges did not make physician employee); *Cilecek, 115 F.3d at 260, 263* (concluding that physician under contract to provide emergency medical services at hospital was independent contractor and not employee). But see *Mallare v. St. Luke's Hosp. of Bethlehem, 699 F. Supp. 1127, 1130 (E.D. Pa. 1988)* (holding that jury could find hospital was prospective employer of physician seeking staff privileges for purposes of Title VII claim).

n52. JCAHO Manual, supra note 1, at MS-2. See also id. MS.1.1.2, at MS-2 ("All medical staff members have delineated clinical privileges that define the scope of patient care services they may provide independently in the hospital.").

n53. See Starr, supra note 8, at 166-67 (noting that hospital boards often expanded available positions for "feeders," doctors who could fill their beds).

n54. Roemer & Friedman, supra note 9, at 34.

n55. See Rosner, supra note 21, at 118 (noting "the authority of lay trustees declined as physicians began to exert greater control over the day-to-day services provided their private patients").

n56. See *Restatement (Second) of Agency* 223 cmt. a (1958) (noting physician at hospital not normally servant of hospital but may be in some circumstances). See also, e.g., *Mitchell v. Frank R. HowardMem'l. Hosp., 853 F.2d 762, 766-67 (9th Cir. 1988)* (concluding radiologist under oral contract to provide all radiology services at hospital, to treat hospital patients, and who was paid by hospital could be employee for purposes of Title VII); *Beverley v. Douglas, 591 F. Supp. 1321, 1327 (S.D.N.Y. 1984)* (distinguishing full-time staff physicians from self-employed physicians with private practices); *Albain v. Flower Hosp., 553 N.E.2d 1038, 1043 n.5 (Ohio 1990)* ("Hospitals often employ full-time salaried physicians"), overruled on other grounds by *Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46 (Ohio 1994).*

n57. See Ed Egger, If Physician Unionization Trend Catches On, Hospitals Could be Drastically Affected, 17 Health Care Strategic Mgmt. 10, 10-11 (1999) (citing AMA 1996 report that forty percent of physicians are employed by health care organizations (including medical schools, hospitals, government entities, and HMOs)). See also Marsha Gold, The Changing US Health Care System: Challenges for Responsible Public Policy, 77 Milbank Q. 3, 14-15 (1999) (noting shift from self-employment to employment in physician-owned groups and groups owned by others).

n58. See, e.g., *Illinois Psychological Ass'n v. Falk, 638 F. Supp. 876, 877 (N.D. Ill. 1986)* ("Only persons on the medical staff may admit patients, order medical treatment, and vote on hospital policies"), affd, *818 F.2d 1337 (7th Cir. 1987);* Ariz. Admin. Code R9-10-214(B) (West, WESTLAW through Dec. 31, 1999) ("Patients shall be admitted to the hospital by a member of the medical staff in accordance with medical staff bylaws, and shall be under the general care of a physician."); Ill. Admin. Code tit. 77, 250.240(b)(1) (West, WESTLAW through Aug. 25, 2000) (providing all patients

must be admitted by a member of medical staff with admitting privileges); id. 250.330(a) (stating that medication and treatment at hospital require order of medical staff member). See also JCAHO Manual, supra note 1, MS.6.5.1, at MS-12 ("Management of a patient's general medical condition is the responsibility of a qualified physician member of the medical staff.").

n59. See JCAHO Manual, supra note 1, at MS-2 (defining "clinical privileges"); id. MS.1.1.2, at MS-2 ("All medical staff members have delineated clinical privileges that define the scope of patient care services they may provide independently in the hospital."). See also, e.g., Ariz. Admin. Code R9-10-214(D) (West, WESTLAW through Dec. 31, 1999) ("Clinical privileges of each medical staff member shall be delineated in writing.").

n60. JCAHO Manual, supra note 1, at MS-2; id. MS.6.4, at MS-12. See also *Bryant v. Glen Oaks Med. Ctr., 650 N.E.2d 622, 624 (Ill. App. Ct. 1995)* (observing that bylaws defined "clinical privileges" as "the permission granted to a practitioner to render specific diagnostic, therapeutic, psychiatric, medical, dental, podiatric or surgical services").

n61. See *Garibaldi v. Applebaum, 653 N.E.2d 42, 44 (Ill. App. Ct. 1995)* (distinguishing between staff privileges and clinical privileges); *Dutta v. St. Francis Reg'l Med. Cir., Inc., 867 P.2d 1057, 1061 (Kan. 1994)* ("A grant of medical staff membership does not guarantee a companion grant of clinical privileges."); *Bartley v. Eastern Maine Med. Ctr., 617 A.2d 1020, 1022-23 (Me. 1992)* (establishing that staff privileges "signify that a doctor is qualified to practice at the hospital... [but] the right to exercise the privileges, however, is a separate matter."); David J. Behinfar, Exclusive Contracting Between Hospitals and Physicians and the Use of Economic Credentialing, *1 DePaul J. Health Care L 71, 78 (1996)* (describing staff privileges as minimum standards

that may be supplemented by clinical privileges, which serve as a grant of right to perform services at the hospital). "Medical staff privileges" or simply "staff privileges" are sometimes equated with "staff membership." See, e.g., *Garibaldi, 653 N.E.2d at 44* (comparing staff privileges with staff membership); *Lewisburg Crnty. Hosp., Inc. v. Alfredson, 805 S.W.2d 756, 760 (Tenn. 1991)* (describing medical staff privileges as flowing from staff membership). When equated with staff membership, staff privileges are distinct from clinical privileges. Cf. JCAHO Manual, supra note 1, at MS-2 (defining "clinical privileges"). But see *42 U.S.C. 11151(3)* (1995) (defining "clinical privileges" to include membership on medical staff); *Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 266-67 (8th Cir. 1983)* (equating "clinical privileges" with "staff privileges"); *Clemons v. Fairview Med. Ctr., Inc., 449 So. 2d 788, 789 (Ala. 1984)* ("The terms "medical staff privileges' and "clinical privileges' refer simply to the right of an individual to treat patients at [the hospital]").

n62. See *Pepple v. Parkview Mem'l Hosp., Inc., 536 N.E.2d 274, 275 (Ind. 1989)* (allowing hospital to limit doctor's surgical privileges).

n63. See JCAHO Manual, supra note 1, MS.6, at MS-11.

n64. Id. at MS-11. Some professional personnel may have clinical privileges but are not members of the medical staff. See Kan. Admin. Regs. 28-34-6a(e)(5) (West, WESTLAW through Feb. 14, 1999) (requiring that hospital bylaws delineate "clinical privileges and duties of professional personnel" who work in "clinical capacity" but "who are not members of the medical staff").

n65. See JCAHO Manual, supra note 1, MS.2, MS.2.1, at MS-3 (establishing that bylaws are adopted by the medical staff).

n66. Id. MS.2.3 to MS.2.3.8, at MS-3 - MS-4.

n67. See *42 C.F.R. 482.22(c)(2) (1999)* (requiring identification of staff membership categories for hospitals participating in Medicare and Medicaid); JCAHO Manual, supra note 1, MS.2.3.4, at MS-3 (requiring description of staff's organization).

n68. William P. Isele, The Hospital Medical Staff: Its Legal Rights and Responsibilities 29 (1984). See also *Davila-Lopes v. Zapata, 111 F.3d 192, 194 (1st Cir. 1997)* (bylaws provided for active, associate, special associate, courtesy, and consulting categories of staff); *Jackaway v. Northern Dutchess Hosp., 526 N. Y.S.2d 599, 599-600 (N. Y. App. Div. 1988)* (contrasting rights and privileges of active staff with courtesy staff).

n69. Fla. Admin. Code Ann. r. 59A-3.220(1) (West, WESTLAW through July 1, 2000). See also, e.g., Ariz. Admin. Code R9-10-214(A) (West, WESTLAW through Dec. 31, 1999) (requiring that hospitals have organized medical staff that answers to governing body for the quality of health care rendered to patients and for ethical conduct of its members); JCAHO Manual, supra note 1, MS. 1, at MS-2 (staff has "overall responsibility for the quality of the professional services provided by individuals with clinical privileges").

n70. See JCAHO Manual, supra note 1, MS.5.1, at MS-7 (establishing that appointments and reappointments made by governing board are based on medical staff recommendations); id. MS.5.3. I, at MS-7 (establishing that mechanisms for appointment and grant of privileges are "approved and implemented by the medical staff and governing body"); id. MS.5.4.1, at MS-8 ("Each clinical department makes recommendations to the medical staff regarding professional criteria for clinical privileges.").

n71. JCAHO Manual, supra note 1, at MS-7.

n72. See, e.g., Kan. Admin. Regs. 28-34-6a(b) (West, WESTLAW through Jan. 1, 1999) ("The medical staff shall adopt bylaws which define the requirements for admission to staff membership and for the delineation and retention of clinical and admitting privileges."); JCAHO Manual, supra note 1, at MS-7 ("The medical staff is responsible for a credentialing process.").

n73. JCAHO Manual, supra note 1, MS.5.3, MS.5.3.1, at MS-7. See also, e.g., I11. Admin. Code tit. 77, 250.310(a)(1) (West, WESTLAW through Aug. 25, 2000) (stating that medical staff must establish written procedure for consideration of applications for staff membership and clinical privileges).

n74. See JCAHO Manual, supra note 1, MS.5.4.1, at MS-8 (requiring recommendations from departments).

n75. See, e.g., Ariz. Admin. Code R9-10-214(D) (West, WESTLAW through Dec. 31, 1999) (stating that medical staff shall recommend to governing body "physicians and other licensed practitioners considered eligible for new and continued membership on the medical staff'); Fla. Admin. Code Ann. r. 59A-3.220(2)(d) (West, WESTLAW through July 1, 2000) (requiring medical staffs to "review" all applications by licensed practitioners for new and continued membership on medical staff and to endorse qualified applicants to the governing authority); Kan. Admin. Regs. 28-34-6a(d) (West, WESTLAW through Jan. 1, 1999) (declaring governing body shall decide upon "each recommendation for appointment to the medical staff" and that application process is to be considered in accordance with medical staffs bylaws); JCAHO Manual, supra note 1, MS.5.1, at MS-7 (establishing that governing body makes appointments based on medical staff recommendations).

n76. See, e.g., *Colo. Rev. Stat. Ann. 25-3-103.5(1)* (1999) (listing factors hospital may consider); *Fla. Stat. Ann. 395.0191(4)* (West Supp. 2000) (listing factors hospital may consider). The hospital has discretion to determine the specific information required. See JCAHO Manual, supra note 1, at MS-7 (allowing individual organization to determine information required for decision making).

n77. See *Tex. Health & Safety Code Ann. 241.101 (c)* (West Supp. 2000) (requiring procedural due process for staff membership review).

n78. See *D.C. Code Ann. 32-1307 (a), (f)* (1998) (requiring "reasonable nondiscriminatory standards"); *Neb. Rev. Stat. Ann. 71-2048.01* (Michie 1999) (requiring establishment of "reasonable standards and procedures" in application process).

n79. See *D.C. Code Ann. 32-1307 09* (1998); *Ga. Code Ann. 31-7-7* (Michie 1996) (setting forth application process requirements for government-owned hospitals); *Va. Code Ann. 32.1-134.1* (Michie 1997) (requiring application review within sixty days).

n80. See, e.g., *Va. Code Ann. 32.1-134.1* (Michie 1997) (providing that reasons for denial must be in writing and provided to physician).

n81. See, e.g., *Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 736 (Ill. 1989)* (involving annual appointments); *Ray v. St. John's Health Care Corp., 582 N.E.2d 464, 467 (Ind. Ct. App. 1991)* (involving two year appointments); *Ritter v. Bd. of Comm'rs, 637 P.2d 940, 944 (Wash. 1981)* (involving annual appointments); *Md. Code Ann., Health-Gen. II 19-319(e)(2)(iii)* (Supp. 1999) (requiring reappointment process at least every two years); JCAHO Manual, supra note 1, MS.5.11 at MS- 10 ("Appointment or

reappointment to the medical staff and the granting, renewal. or revision or clinical privileges are made for a period of no more than two years.").

n82. *Md. Code Ann., Health-Gen. H 19-319(e)(2)(iii)* (Supp. 1999).

n83. See JCAHO Manual, supra note 1, MS.5.12 to MS.5.12.3, at MS-10 ("Appraisal for reappointment to the medical staff or renewal or revision of clinical privileges is based on ongoing monitoring of information concerning the individual's professional performance; judgment; and clinical or technical skills.").

n84. See, e.g., *Fla. Stat. Ann. 395.0193(2),* (3) (West, WESTLAW through Dec. 31, 1999) (describing peer review procedures); Kan. Admin. Regs. 28-34-6a(e)(10) (West, WESTLAW through Jan. 1, 1999) (requiring medical staff bylaws establish procedures to monitor "the performance of the medical staff and each department or service" and make recommendations to the medical staff and multidisciplinary committee); Kan. Admin. Regs. 28-34-6a(e)(11) (mandating peer review must also encompass medical staff member's performance in regard to "relevant ethics and statutory codes of conduct); JCAHO Manual, supra note 1, MS.8 to MS.8.4, at MS-49.

n85. See JCAHO Manual, supra note 1, at MS-49 (stating that "members of the medical staff are involved in activities to measure, assess, and improve performance on an organizationwide basis" including "measurement of outcomes and of processes."); 1 Tom Curtis, The Medical Staff, Treatise on Health Care Law 6.0411] (Michael G. MacDonald et al., eds. 1999).

n86. See, e.g., *Fla. Stat. Ann. 395.0193(3)* (West 1999) (describing discipline procedure); *Miss. Code Ann. 73-25-93(1)* (1999) (authorizing hospital to suspend, deny, revoke or limit privileges if warranted).

n87. JCAHO Manual, supra note 1, MS.2.3.3, at MS-3.

n88. See, e.g., *Cal. Bus. & Prof. Code 809.5(a)* (West 1990 & Supp. 2000) (citing grounds for immediate suspension); *Fla. Star. Ann. 395.0193(3)* (West 1999) (listing grounds for disciplinary measures); 59 Fla. Admin. Code Ann. r. 59A-3.217(5) (West WESTLAW through July 1, 2000) (stating that governing body has power to decline any staff member for "good cause" which includes but is not limited to "incompetence, negligence," substance abuse, "mental or physical impairment" that may negatively affect patient care, and "behavior disruptive to hospital environment"); *210 Ill. Comp. Stat. Ann. 85/10.4 (b)(2)(C)(i)* (West Supp. 2000) (allowing suspension without hearing if staff member presents "immediate danger" to others).

n89. Cf. Sheree Lynn McCall, A Hospital's Liability for Denying, Suspending and Granting Staff Privileges, *32 Baylor L Rev. 175, 175 (1980)* ("A physician's livelihood is dependent on acquiring and maintaining hospital staff privileges. This access to hospital facilities is necessary for most physicians to adequately treat and care for patients, to maintain their medical practice, and to pursue their medical career.").

n90. See *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 571 (Haw. 1972)* ("The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him."); *Burkhart v. Cmty. Med. Ctr., 432 S.W.2d 433, 436 (Ky. 1968)* (discussing the rights of physicians to staff membership in hospital); 1 Barry R. Furrow, et al., Health Law 7-1 at 449 (1995) (stating access to

hospitals is essential for a doctor to be successful practicing medicine); Note, The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, *1966 Wash. U. L.Q. 485, 510-11* (noting for doctor to be successful, he/she must have access to hospitals).

n91. See *Holmes v. Hoemako Hosp., 573 P.2d 477, 480 (Ariz. 1977)* (Struckmeyer, V.C.J., dissenting) (noting doctor was the only doctor in community and hospital was the only hospital serving that community); *Lawler v. Eugene Wuesthoff Mem'l Hosp., 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986)* (stating loss of privileges "is a serious disadvantage to his or her ability to continue to practice in the community); *Greisman v. Newcomb Hosp., 192 A.2d 817, 821 (N.J. 1963)* (observing that only hospital in metropolitan area had virtual monopoly); *Kelly v. St. Vincent Hosp., 692 P.2d 1350, 1353 (N.M. Ct. App. 1984)* (noting that because many towns are isolated with only one hospital, a staffing decision can essentially deny a doctor opportunity to practice medicine); *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1, 637 P.2d 940, 949 (Wash. 1981)* (Dore, J., dissenting) (noting physician's predicament in one-hospital town).

n92. See JCAHO Manual, supra note 1, MS.5.5, at MS-8; Chester A. Groseclose, Jr., Hospital Privilege Cases: Braving the Dismal Swamp, *26 S.D.L. Rev. 1, 1 (1981)* (noting that hospital staff bylaws require such disclosures). For examples of bylaws requiring such disclosures see Joint Commission on Accreditation of Hospitals, Guidelines for the Formulation of Medical Staff Bylaws 1971 at 10 (1977) [hereinafter "JCAH Guidelines for Bylaws"]. See also, e.g., Bylaws of the Yale-New Haven Hosp., Inc. for the Medical Staff art. V, B(3) (Sept. 8, 1999) <http://www.ynhh.com/med<uscore>prof/bylaws/contents.html> [hereinafter "Yale-New Haven Hosp. Bylaws"]; Presbyterian Hosp. Medical Staff By-Laws 1995 art. III, 4(1)

(revised Jan. 18, 1995) <http://cpmcnet.columbia.edu/dept/assurance/phby0000.html> [hereinafter "Presbyterian Hosp. Bylaws"]; The Hospital Council of Western Pennsylvania, Model Medical Staff Bylaws 4.2-2 (visited October 21, 2000) <http://www.hcwp.org/meddirfm/bylaws.htm> [hereinafter "HCWP Model Bylaws"]; The University of Texas Medical Branch, Bylaws and Rules and Regulations of the Medical Staff: The University of Texas Medical Branch at Galveston 2.3.5, 2.3.6.6 Art. IV (rev. Feb. 17, 1999) <http://www.utmb.edu/policy/bylaws>[hereinafter TMB Bylaws"].

n93. See Barbara A. Blackmond, Current Issues - The National Practitioner Data Bank and Hospital Peer Review, *7 Health Law. 1, 6 (1993).*

n94. See *Mateo-Woodburn v. Fresno Cmty. Hosp., 270 Cal. Rptr. 894, 903 (Cal. Ct. App. 1990)* (stating adverse action based on professional inadequacy or misconduct severely impairs ability to become staff member at another hospital); *State ex rel Bronaugh v. City of Parkersburg, 136 S.E.2d 783, 788 (W. Va. 1964)* (observing that public hospital's denial of privileges without a hearing was based on denial of privileges at another hospital).

n95. JCAHO Manual, supra note 1, MS.5.4.3.2, at MS-8.

n96. See *45 C.F.R. 60.1* (1999) (noting establishment of data bank on physician, dentist and healthcare providers for competency and conduct).

n97. See Ruth E. Flynn, Demand for Public Access to the National Practitioner Data Bank: Consumers Sound Their Own Death Cry, *18 Hamline J. Pub. h & Pol'y 251, 251 (1996)* (stating Data Bank established by the Act became operational on Sept. 1, 1990).

n98. See *42 U.S.C. 11101,* et seq. (1995) (addressing national problem of medical malpractice and need to restrict ability of physicians to travel from state to state); *Imperial v. Suburban Hosp. Ass'n Inc., 37 F.3d 1026, 1028 (4th Cir. 1994)* (discussing HCQIA). See also H.R. Rep. No. 903, 99th Cong.2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 6384-6391 (detailing purpose of professional review committees, including collection and dissemination of malpractice information and adverse actions against medical providers).

n99. See *42 U.S.C. 11111,* 11151(11) (1995) (defining professional review body and limiting damages for professional review actions). See also, e.g., *Brader v. Allegheny Gen. Hosp., 167 F.3d 832, 834 (3d Cir. 1999)* (finding hospital met safe harbor requirement under HCQIA); *Wayne v. Genesis Med. Ctr., 140 F.3d 1145, 1148 (8th Cir. 1998)* (articulating HCQIA protects hospitals from liability when specific review actions followed). Underreporting to the Data Bank may be undermining its effectiveness however. Those concerned that hospitals are underreporting physician disciplinary actions to the Data Bank cite a U.S. Department of Health and Human Services report that from September 1990 to September 1998, about sixty-seven percent of all United States Hospitals had not reported a single disciplinary action against a doctor. Letter of Rep. Tom Bliley, Chairman of the House Committee on Commerce, to Richard Davidson, President, American Hospital Association, Nov. 23, 1999 (visited Oct. 21, 2000) http://www.house.gov/commerce> (quoting report and sixty-seven percent statistic). According to Thomas Croft, Director of the Division of Quality Assurance, Health

Resources and Services Administration, the Department of Health and Human Services is considering a proposal to seek a legislative change allowing imposition of monetary penalties where hospitals fail to report reportable actions. Assessing the Operation of the National Practitioner Data Bank: Oversight Hearing Before the Subcommittee on Oversight & Investigations of the House Comm. on Commerce, 106th Congress. (Mar. 16, 2000) (statement of Thomas Croft, Director of the Division of Quality Assurance, Health Resources and Services Administration) (visited Oct. 21, 2000) <http://www.house.gov /commerce>.

nl00. 42 *U.S.C. ll133(a)(1)(A)(1995); 45 C.F.R. 60.9(a)(1)(i)(1999).* See also *Babcock v. St. Francis Med. Ctr., 543 N.W.2d 749, 755-56 (Neb. Ct. App. 1996)* (citing HCQIA and regulations). The Act also requires the hospital to report when it accepts the surrender of a physician's clinical privileges under certain circumstances. *42 U.S.C. 11133(a)(1)(B)* (1995).

N101.42 *U.S.C. 11151(1)* (1995).

n102. See *42 U.S.C. ll133(b),* 11134(a) (1995); *45 C.F.R. 60.4,* 60.5(c), 60.9(b) (1999) (requiring reporting by board of medical examiners).

n 103. See *42 U.S.C. 11131,* 11132 (1995) (discussing requirement of reports on medical malpractice payments).

n104. See *42 U.S.C. 11137(b)* (1995) (addressing confidentiality of information); *45 C.F.R. 60.11,* 60.13 (1999) (addressing confidentiality of information requested from National Practitioner Data Bank). Congressman Thomas Bliley, Chairman of the House Committee on Commerce, and others have recently advocated opening the National Practitioner Data Bank to the public. See Sandra G.

Boodman, The Right to Know: Still Trying to Open the Database on Doctors, Wash. Post, Mar. 7, 2000, at Z13 (discussing efforts of Senator Ron Wyden and Rep. Bliley to open the Data Bank to the public). On March 1, 2000 and March 16, 2000, Congress held hearings considering the advisability of allowing public access to the National Practitioner Data Bank. The text of several of the statements before House Subcommittee on Oversight and Investigations at those hearings can be found at <http://www.house.gov/commerce> (visited Oct. 21, 2000).Error! Bookmark not defined.

n105. See *42 U.S.C. 11135(a)* (1995), *45 C.F.R. 60.10(a)* (1998) (setting forth the duty of hospitals to obtain information).

n106. See, e.g., *Ca. Code Ann. 31-7-8(a)* (1996) (requiring hospital administrator to submit written report to licensing board concerning denial, restriction or revocation of staff privileges); *Mass. Gen. Laws Ann. ch. 111, 53B* (West Supp. 2000) (requiring report of disciplinary hearing filed with board of registration of medicine within thirty days); *Utah Code Ann. 58-13-5(3)* (1998) (requiring report of adverse action filed with Utah Medical Association within sixty days of event); *University of S. Cal. v. Superior Court, 53 Cal. Rptr. 2d 260, 264 n.6 (Cal. Ct. App. 1996)* (requiring report of denial of staff privileges to Medical Board).

n107. See *Ga. Code Ann. 31-7-809 (1996)* (stating non-compliance may result in loss of permit to operate); *Mass. Gen. Laws Ann. ch. 111, 53B* (West Supp. 2000) (stating non-compliance may result in fine not in excess of $10,000).

n108. One court concluded that "finding gainful employment in the hospital setting after a poor review is unlikely as a result of the provisions of the Health Care

Quality Improvement Act of 1986, *42 U.S.C. 11101-52* (1986), which requires that doctors who have been denied privileges be reported to a national service." *Cooper v. Delaware Valley Med. Ctr., 654 A.2d 547, 551 (Pa. 1995).* See also *Janes v. Centegra Health Sys., 721 N.E.2d 702, 707-08 (Ill. Ct. App. 1999)* (noting pathologist's argument that report of a ""for cause' revocation of his clinical privileges to the National Practitioner Data Bank" would "directly injure his ability to gain future employment as a pathologist anywhere in the country"); Jacqueline Oliverio, Note, Hospital Liability for Defamation of Character During the Peer Review Process: Sticks and Stones May Break My Bones, but Words May Cost Me My Job, *92 W. Va. L. Rev. 739, 740 (1990)* (noting that denial of privileges based on poor performance can have devastating effects on a physician's career).

n109. *Ritter v. Bd. of Comm'rs, 637 P.2d 940, 942 (Wash. 1981).*

n110. *Id. at 942-43.*

n 111. *Id. at 952-53* (Dore, J., dissenting).

n112. Based on this interest, California courts have recognized ""[a] physician's right to pursue his livelihood free from arbitrary exclusionary practices.'" *Webman v. Little Co. of Mary Hosp., 46 Cal. Rptr. 2d 90, 95 (Cal. Ct. App. 1995)* (alteration in original) (citing *Rhee v. E! Camino Hosp. Dist., 247 Cal. Rptr. 244 (Cal. Ct. App. 1988)).*

n113. See *Rao v. Bd. of County Comm'rs, 497 P.2d 591, 592-93 (Wash. 1972)* (discussing applicant's requirement of providing references is in interest of providing quality care and noting hospital's "economic success depends in large degree upon its good reputation").

n114. See infra notes 542-48 and accompanying text for a discussion of the deference courts afford credentialing decisions.

n115. Charitable immunity was first adopted in the United States in *McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876),* which relied on earlier English cases of dubious authority. See *Bing v. Thunig, 143 N.E.2d 3, 5 (N. Y. 1957)* (citing McDonald for doctrine of charitable immunity); *Pierce v. Yakima Valley Mem'l Hosp. Ass'n, 260 P.2d 765, 768 (Wash. 1953)* (stating that McDonald court relied on English authority as sole basis for its holding). Other American courts followed McDonald's lead. See, e.g., *Perry v. House of Refuge, 63 Md. 20, 26-28 (Md. 1885)* (discussing charitable immunity); *Richardson v. Carbon Hill Coal Co., 32 P. 1012, 1013 (Wash. 1893)* (same); *Downs v. Harper Hosp., 60 N. W. 42, 43 (Mich. 1894)* (same); *Lindler v. Columbia Hosp., 81 S.E. 512, 512 (S.C. 1914)* (same); *Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)(same).*

n116. See 1 Barry R. Furrow, et al., Health Law 7-1, at 449-51 (1995) (discussing governmental immunity).

n117. See, e.g., *President of Georgetown College v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942)* (rejecting charitable immunity doctrine); *Silva v. Providence Hosp., 97 P.2d 798, 802 (Cal. 1939)* (declining to follow charitable immunity doctrine); *Parker v. Port Huron Hosp., 105 N. W.2d 1, 14-15 (Mich. 1960)* (adopting new rule of no charitable immunity for hospitals); *Bing, 143 N.E.2d at 8-9* (finding nonliability "out of tune" with modern life); *Pierce, 260 P.2d at 774* (abrogating nonliability doctrine). Even before abrogating the doctrine, courts had begun to impose numerous exceptions to charitable immunity, prompting one court to observe, "in this state, as elsewhere, the immunity rule has been "devoured' with exceptions." *Pierce, 260 P.2d at 772.* See generally John D. Hodson, Annotation, Liability of Hospital or Sanitarium for Negligence of

Physician or Surgeon, *51 A.L.R. 4th 235 (1987)* for a discussion of cases holding hospitals liable for acts of their agents.

n118. See, e.g., *Pierce, 260 P.2d at 768* (noting "the "rule' is that one is liable for his negligent or tortious conduct. The "rule' is that charity is no defense to tort. The immunity from suit granted charitable institutions, in actions involving tortious conduct, is an exception to these rules.") (citations omitted).

n119. Cf., e.g., *Vargo v. Sauer, 576 N. W.2d 656, 660, 664 (Mich. 1998)* (noting "governmental agencies are statutorily immune from tort liability "except as otherwise provided'" and defining governmental agency as "the state, political subdivisions, and municipal corporations") (alteration in original); *Salcedo v. El Paso Hosp. Dist., 659 S. W.2d 30, 31 (Tex. 1983)* (noting "the E1 Paso Hospital District is a political subdivision of the State of Texas. As such, it is not liable for damages unless the negligent or wrongful act alleged falls within the statutory waiver of immunity.").

n120. See *Salcedo, 659 S. W.2d at 30* (finding statutory waiver applicable); *Condemarin v. University Hosp., 775 P.2d 348, 364 (Utah 1989)* (finding portions of governmental immunity act unconstitutional). See Furrow, supra note 116, at 7-1, at 450-51 (discussing governmental immunity).

n121. See infra notes 125-47 and accompanying text for a discussion of the various contexts in which courts have held hospitals liable for medical staff members' malpractice.

n122. See Daniel L. Icenogle, Annotation, Hospital Liability as to Diagnosis and Care of Patients in Emergency Room, *58 A.L R.5th 613 (1998)* (discussing hospital liability).

n123. See, e.g., *Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 794-96 (Ill. 1993)* (discussing agency principles); *Paintsville Hosp. Co. v. Rose, 683 S. W.2d 255, 256-58 (Ky. 1985)* (discussing ostensible agency); *Clark v. Southview Hasp. & Family Health Ctr., 628 N.E.2d 46, 53 (Ohio 1994)* (utilizing doctrine of agency by estoppel to find hospital liable); *Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 159 (Or. Ct. App. 1981)* (applying ostensible agency doctrine); *Rodrigues v. Miriam Hosp., 623 A.2d 456, 462 (R.I. 1993)* (applying, for the first time, doctrine of apparent authority); *Baptist Mem'l Hosp. Sys. v. Sampson, 969 S. W.2d 945, 947-48 (Tex. 1998)* (applying doctrine of ostensible agency). See also Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, *47 S.C. L Rev. 431, 445-52 (1996)* (discussing agency principles); *Restatement (Second) of Agency 267* (1958) (finding reliance upon care or skill of servant creates agency); *Restatement (Second) of Torts 429* (1965) (outlining aspects of agency relationship).

n124. See *Jackson v. Power, 743 P.2d 1376, 1384-85 (Alaska 1987)* (discussing "non-delegable duty" theory); *Simmons v. Tuomey Reg'l Med. Ctr., 533 S.E.2d 312, 320-21 (S.C. 2000)* (imposing a nondelegable duty on hospitals). See also *Martell v. St. Charles Hosp., 523 N.Y.S.2d 342, 352 (N.Y. Sup. Ct. 1987)* (not citing nondelegable duty, but reaching same result on public policy grounds). But see *Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947-49 (Tex. 1998)* (reversing court of appeals' holding imposing nondelegable duty).

n125. *743 P.2d 1376 (Alaska 1987).*

n126. *Id. at 1381-82.*

n127. *Id. at 1385.*

n128. McWilliams & Russell, supra note 123, at 457 (quoting *Albian v. Flower Hosp., 553 N.E.2d 1038, 1046 (Ohio 1990)*). See also *Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 54 (Ohio 1994)* (Moyer, C.J., dissenting) (accusing majority of making "a hospital the virtual insurer of its independent physicians"); *id. at 56* (Wright, J.J., dissenting) (claiming that "from this day on no malpractice action evolving out of an incident within a hospital will be brought without joining the medical facility as a co-defendant").

n129. See *Doctors Hosp. v. Bonner, 392 S.E.2d 897, 906-07 (Ga. Ct. App. 1990)* (holding hospital can be liable under apparent authority doctrine); *Kashishian v. Port, 481 N. W.2d 277, 284-86 (Wis. 1992)* (same); *Sharsmith v. Hill, 764 P.2d 667, 672-73 (Wyo. 1988)* (same). See also Kenneth S. Abraham & Paul C. Weiler, Enterprise Medical Liability and the Evolution of the American Health Care System, *108 Harv. L. Rev. 381, 388 (1994)* (finding apparent authority creates liability for hospital even if staff contracted to provide services and are not employees).

n130. *211 N.E.2d 253 (IlL 1965).*

n131. *Darling, 211 N.E.2d at 255.*

n132. *Id. at 255-56.*

n133. *Id. at 256.*

n134. *Id.*

n135. *Id.*

n136. *Darling, 211 N.E.2d at 257* (quoting *Bing v. Thunig, 143 N.E.2d 3, 8 (N. Y. 1957)*). One commentary accurately notes that while Darling is widely credited with taking the first step toward adopting corporate liability, its

principal focus was actually the malpractice of the hospital nursing staff rather than the hospital's responsibility for the malpractice of the attending physician. See Abraham & Weiler, supra note 129, at 390 n.34 (noting that principle focus of Darling was negligence of hospital staff in failing to monitor and report on deteriorating condition of surgical patient).

n137. See, e.g., *Fridena v. Evans, 622 P.2d 463, 466 (Ariz. 1980)* (adopting corporate negligence theory); *Insinga v. LaBella, 543 So. 2d 209, 213-14 (Fla. 1989)* (citing Darling and adopting corporate negligence doctrine); *Corleto v. Shore Mem'l Hosp., 350 A.2d 534, 539 (N.J. Sup. Ct. Law Div. 1975)* (finding vicarious liability where hospital contracted with incompetent physician); *Diaz v. Feil, 881 P.2d 745, 749 (N.M. Ct. App. 1994)* (clarifying corporate negligence doctrine adopted in New Mexico); *Bost v. Riley, 262 S.E.2d 391, 396 (N.C. Ct. App. 1980)* (citing Darling for hospital's duty to patient); *Strubhart v. Perry Mem'l Hosp. Trust Auth., 903 P.2d 263, 275-76 n. 13 (Okla. 1995)* (reviewing jurisdictions adopting corporate negligence doctrine); *Thompson v. Nason Hosp., 591 A.2d 703, 707 (Pa. 1991)* (finding hospital liable under corporate negligence doctrine); *Rodrigues v. Miriam Hosp,, 623 A.2d 456, 462-63 (R.I. 1993)* (applying doctrine of corporate negligence where hospital failed to exercise reasonable care selecting staff); *Denton Reg'l Med. Ctr. v. LaCroix, 947 S.W.2d 941, 950 (Tex. Ct. App. 1997)* (declaring, under Texas law, hospital may be independently liable for injury); *Pedroza v. Bryant, 677 P.2d 166, 169-70 (Wash. 1984)* (detailing history of corporate negligence theory and adopting corporate negligence). But see *Gafner v. Down East Cmty. Hosp., 735 A.2d 969, 974 (Me. 1999)* (refusing to adopt corporate liability theory as formulated in Darling and Thompson); McWilliams & Russell, supra note 123, at 473-74 (criticizing theory as attempt to make hospital insurer for all medical staff).

n138.591 *A.2d 703 (Pa. 1991).*

n139. *Thompson, 591 A.2d at 707-08* (citations omitted).

n140. See *Insinga, 543 So. 2d at 213-14* (finding duty to "select and retain" competent staff); *Strubhart, 903 P.2d at 276-78* (discussing selection and retention of hospital staff); *Rodrigues, 623 A.2d at 462-63* (discussing selection and review of staff privileges).

n141. See, e.g., *Insinga, 543 So. 2d at 214* (imposing duty on hospital to select and retain competent physicians: "The hospital will only be responsible for the negligence of an independent physician when it has failed to exercise due care in the selection and retention of that physician on its staff').

n142. See, e.g., *Humana Med. Corp. v. Traffanstedt, 597 So. 2d 667, 669 (Ala. 1992)* (requiring implicitly some proof staff member was negligent); *Johnson v. Misericordia Cmty. Hosp., 301 N. W.2d 156, 163-64 (Wis. 1981)* (discussing concepts of negligence and duty).

n143. *Thompson, 591 A.2d at 709* (Flaherty, J., dissenting).

n144. *Abraham & Paul C. Weiler, supra* note 129, at 393.

n145. Id.

n146. *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr., 73 Cal. Rptr. 2d 695, 707 (Cal. Ct. App. 1998)* (citations omitted).

n147. *Holmes v. Hoemako Hosp., 573 P.2d 477, 479 (Ariz. 1977).* President Clinton's proposal that hospitals be required to report medical errors that result in death or serious harm has heightened concerns of increased legal liability for hospitals. See Julie Marquis & Alissa J. Rubin, National Perspective Health Hospitals, Doctors Fear Fallout for Call for Error Reporting, L.A. Times, Feb. 23, 2000, at A-5. ("Hospital and physician organizations voiced strong concerns... about President Clinton's proposal for mandatory reporting of serious or deadly medical errors, saying it could lead to a proliferation of malpractice lawsuits and encourage a "culture of blame' in medicine."). See also Report of the Quality Interagency Coordination Task Fource (QulC) to the President, Doing What Counts for Patient Safety: Federal Actions to Reduce Medical Errors and Their Impact (Feb. 2000) (recommending a mandatory reporting system by hospitals of certain medical errors) (visited Oct. 21, 2000) <www.quic.gov>.

n148. American Med. Ass'n, Policy Compendium 230.975 at 197 (1993); accord *210 Ill. Comp. Stat. Ann. 85/3(b)(3)* (West 1993) (codifying AMA definition). See also John D. Blum, Economic Credentialing: A New Twist in Hospital Appraisal Processes, *12 J. Legal Med. 427, 428-29 (1991)* (discussing meaning of "economic credentialing").

n149. See Blum, supra note 148, at 443 (discussing economic credibility); Behinfar, supra note 61, at 71, 83-84 (same); Daniel D. King & Joel T. Allison, Medical Staff Credentialing: Taking Steps to Avoid Liability, Def. Couns. J. 107, 1112-13 (Jan. 1994) (finding exclusive contracts entered into to improve hospitals' economic situations). Of course the decision to enter an exclusive contract may result from any number of factors, many of which may be legitimate quality of care concerns. Hospitals with primarily economic motives, recognizing the potential perils of economic credentialing, may choose to identify plausible

non-economic justifications for their decisions to avoid criticism or litigation.

n150. See Brad Dallet, Note, Economic Credentialing: Your Money or Your Life!, *4 Health Matrix 325, 342 & nn.98-101 (1994)* (discussing economic credentialing). See Judith E. Orie, Comment, Economic Credentialing: Bottom-Line Medical Care, *36 Duq. L Rev. 437, 441-42 (1998)* for a discussion of criteria often used in economic credentialing.

n151. See American Med. Ass'n, Policy Compendium 230.975, 230.976 at 197 (1993) ("The AMA... strongly opposes the practice of economic credentialing...."); Orie, supra note 150, at 442 ("The AMA and other medical organizations are vehemently opposed to economic credentialirtg."). The AMA's vigorous opposition continues apace. In a December 11, 1999 letter, AMA Executive Vice President E. Ratcliffe Anderson "asked the Inspector General's Office of the Department of Health and Human Services to declare hospital "exclusive credentialing' arrangements a violation of federal fraud laws." Thorn Wilder, AMA Calls "Exclusive Credentialing' By Hospitals a Fraud Violation, 9 BNA's Health Law Reporter 344 (Mar. 9, 2000). In the letter, Anderson stated that "economic credentialing is a troubling phenomenon." Id.

n152. See Richard A. Feidstein, Economic Credentialling and Exclusive Contracts, *9 Health Law 1, 1 (1996)* (stating that hospitals "face increasing pressure to cut costs and increase efficiencies," and therefore "increasingly make credentialing decisions on economic grounds"); Orie, supra, note 150, at 438 ("The terms "cost efficiency' and "cost containment,' frequently touted by hospitals, are merely euphemisms for economic credentialing... As hospitals consolidate, they are forced to focus even more on financial considerations, rather than patient outcome."); id. at 448 ("Increasingly, hospitals are looking to economic

credentialing to mitigate the financial pressures imposed by governmental and insurance company payors."); Howard Larkin & Brian McCormick, The Many Faces of Economic Credentialing, 35 Am. Med. News 3 (July 20, 1992).

n153. See Brian A. Dahl, Economic Credentialing: The Propriety of Managing Physician Costs Through Privileging, 44 J. Healthcare Mgmt. 302, 302 (1999) (economic credentialing "is becoming increasingly prevalent"); Larkin & McCormick, supra note 152, at 3 ("It's unclear how widespread economic credentialing is, but many signs point to increasing prevalence.")

n154. See *Ind. Code Ann. 16-21-2-5(3)(C)* (West Supp. 2000) (recognizing "efficient and effective use of hospital resources" as criteria for staff privileges); *Ind. Code Ann. 16-22-3-9(c)(3)* (West 1997) (allowing standards identifying "efficient and effective utilization of hospital resources"); cf. *Williams v. Hobbs, 460 N.E.2d 287, 292 (Ohio Ct. App. 1983)* (approving termination of radiology privileges in compliance with exclusive contrac0; *Lyons v. St. Vincent Health Ctr., 731 A.2d 206, 212 (Pa. Commw. Ct. 1999)* (upholding refusal to renew radiologist's clinical privileges due to exclusive contract with radiology group).

n155. *Ind. Code Ann. 16-21-2-5(3)(C),* 16-22-3-9(c)(3)(West Supp. 2000).

n156. *210 Ill. Comp. Star. Ann. 85/2(b)* (West Supp. 2000). See also *210 Ill. Comp. Stat. Ann. 85/10.4(b)(1)(E),* (b)(2)(B), (b)(3) (West Supp. 2000) (requiring written explanation to applicant whose privileges are denied or limited, and reporting to Hospital Licensing Board credentialing decisions based substantially on economic factors to study effects such decisions have on access to care and availability of physician services).

n157. Dahl, supra note 153, at 303.

n158. See *Rao v. Bd. of County Comm'rs, 497 P.2d 591, 593 (Wash. 1972)* (stating that public interest is "the most vital interest in the quality of medical care received in a hospital").

n159. *Sosa v. Bd. of Managers, 437 F.2d 173, 177 (5th Cir. 1971);* accord *Branch v. Hempstead County Mem'l Hosp., 539 F. Supp. 908, 918 (W.D. Ark. 1982)* (supporting a limited judicial role and deference to board decisions); *Smith v. Our Lady of the Lake Hosp., Inc., 639 So. 2d 730, 742 (La. 1994)* (recognizing and deferring to expert skill of medical community to police itself); *Campbell v. St. Mary's Hosp., 252 N. W.2d 581, 587 (Minn. 1977)* (interpreting Minnesota statute as encouraging self-policing of medical profession); *Wong v. Garden Park Cmty. Hosp., Inc., 565 So. 2d 550, 553 (Miss. 1990)* (interpreting Mississippi statute as supporting hospital's right to regulate staff); *Cameron v. New Hanover Mem'l Hosp., Inc., 293 S.E.2d 901, 922 (N.C. Ct. App. 1982)* (determining court should not substitute board's judgment); *Rao v. Auburn Gen. Hosp., 573 P.2d 834, 836 (Wash. Ct. App. 1978)* (finding hospital has discretion to exclude doctors from its staff).

n160. See *Fritz v. Huntington Hosp., 348 N.E.2d 547, 554 (N. Y. 1976)* (stating that "availability of health services is a matter of vital public concern, and hospitals.., direct their best efforts toward ameliorating medical service shortages and increasing the availability of physicians").

n161. See *Holmes v. Hoemako Hosp,, 573 P.2d 477, 479-80 (Ariz. 1977)* (finding opportunity to choose doctor is a public interest); *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 568 (Haw. 1972)* (finding fiduciary duty in hospital's selection of physicians); *Berman v. Valley Hosp., 510 A.2d 673, 676 (N.J. 1986)* (recognizing patient's need to have opportunity to select physician and have access to hospital); *Greisman v.*

Newcomb Hosp., 192 A.2d 817, 824 (N.J. 1963) (recognizing patient of doctor will want to be admitted under own doctor's care).

n162. *Balkissoon v. Capitol Hill Hosp., 558 A.2d 304, 308 (D.C. Cir. 1989)* (quoting *Nanavati v. Burdette Tomlin Mem'l Hosp., 526 A.2d 697, 701 (N.J. 1987)).*

n163. See infra notes 165-68 and accompanying text for a discussion of legislation encouraging peer review of physicians.

n164. Scheutzow, supra note 2, at 7. The credentialing process is only one facet of the broader concept of peer review which also encompasses utilization review, infections review, and the review of specific hospital functions. Arthur F. Southwick & Debra A. Slee, Quality Assurance in Health Care, 5 J. *Legal Med. 343, 344 (1984).*

n165.42 *U.S.C. 11101(3)* (1995) (suggesting that "professional peer review" can help solve the national problem of medical malpractice).

n166. Id. at 11111

n167. See infra note 168 and accompanying text for example of a state statute encouraging peer review as a matter of public policy.

n168. *210 Ill. Comp. Star. Ann. 85/10.2* (West Supp. 2000); 225 *Ill. Comp. Star. Ann. 60/5* (West 1998). For similar pronouncements, see *Cal. Bus. & Prof Code 809(a)(3)* (West 1990) (declaring peer review "essential to preserving the highest standards of medical practice"); *Haw. Rev. Star. Ann. 671D-3* (Michie 1996) (declaring peer review addresses rise in medical malpractice issues). See also *Scappatura v. Baptist Hosp., 584 P.2d 1195, 1200 (Ariz. Ct. App, 1978)* (finding "public policy calls for the intervention by hospital and

medical staffs between physicians and patients in the interests of sound patient care").

n169. See *Van Campen v. Olean Gen. Hosp., 205 N.ES. 554, 555-56 (N.Y. App. Div. 1924)* (stating that public hospitals are instrumentalities of state), affd, *147 N.E. 219 (N. Y. 1925).*

n170. *Id. at 555.* Accord *Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59, 61 (D.D.C. 1963)* (stating that public hospitals are supported by government funds and are managed by the government); *Edson v. Griffin Hosp., 144 A.2d 341, 343 (Conn. Super. Ct. 1958)* (noting that city hospitals are public institutions, owned by public and devoted to public); *Hughes v. Good Samaritan Hosp., 158 S.W.2d I59, 161 (Ky. 1942)* (citing Van Campen as authority for proposition that public hospitals are publicly funded and operated); *Levin v. Sinai Hosp., Inc., 46 A.2d 298, 300 (Md. 1946)* (noting that public corporations are funded and maintained by government).

n171. *Shulman, 222 F. Supp. at 61.*

n172. See, e.g., *Yashon v. Hunt, 825 F.2d 1016, 1022 (6th Cir. 1987)* (considering procedural due process violations); *Sosa v. Bd. of Managers, 437 F.2d 173, 174 (5th Cir. 1971)* (considering Fourteenth Amendment violations); *Campbell v. St. Mary's Hosp., 252 N. W.2d 581, 585 (Minn. 1977)* ("It is of course elementary that the due process provisions of the Fourteenth Amendment and Minn. Const. art. 1, 7, apply only if the actions to terminate plaintiffs surgical privileges were done under color of state law."); *Ritter v. Bd. of Comm'rs, 637 P.2d 940, 944-45 (Wash. 1981)* (considering due process violations); el. *Hayman v. City of Galveston, 273 U.S. 414, 416-17 (1927)* (questioning but assuming that public hospital's actions were limited by Fourteenth Amendment and finding regulation excluding osteopath was not arbitrary nor unreasonable); *Newton v. Bd.*

of Comm'rs, 282 P. 1068, 1070 (Colo. 1929) (following Hayman).

n173. See *Findlay v. Bd. of Supervisors, 230 P.2d 526, 530 (Ariz. 1951)* (holding that public hospital could not terminate physician privileges based on unconstitutional resolution); *Ware v. Benedikt, 280 S. W.2d 234, 236 (Ark. 1955)* (stating that doctors may not be denied privileges based on unreasonable or arbitrary rules); *Hamilton County Hosp. v. Andrews, 84 N.E.2d 469, 471 (Ind. 1949)* (noting that physicians may not be discriminated against by county hospital); *Alpert v. Bd. of Governors, 145 N. Y.S.2d 534, 537-39 (N. Y. App. Div. 1955)* (stating that physicians may not be kept out of public hospitals by operation of unreasonable rules); *Henderson v. City of Knoxville, 9 S. W.2d 697, 698 (Tenn. 1928)* (stating that public hospitals may not enforce regulations that violate state law against doctors); *Johnson v. City of Ripon, 47 N. W.2d 328, 330 (Wis. 1951)* (stating that public hospitals may not enforce unreasonable regulations pertaining to physician privileges).

n174. See, e.g., *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 239 n.24 (Conn. 1994)* (noting private hospital action not state action and, thus, not subject to constitutional compliance); *Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 739 (Ill. 1989)* (noting private hospital's acts not subject to due process considerations); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 759 (Neb. Ct. App. 1996)* (establishing lack of state action by private hospital insulates hospital's decisions from constitutional scrutiny); *Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113, 116 (Ohio 1989)* (stating appellee's failure to show state action by private hospital destroyed his constitutional claim).

n175.17 *U.S. (4 Wheat.) 518 (1819).*

n176. Id. at 668-69.

n177. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, 1.

n178. See infra notes 178-83 and accompanying text for examples of Supreme Court's adherence to the holding that the 14th Amendment applies only to state action.

n179. *419 U.S. 345 (1974).*

n180. *Jackson, 419 U.S. at 349* (citing Shelley v. Kramer, 334 U.S. (1949)).

n181.500 *U.S. 614 (1991).*

n182. *Edmonson, 500 U.S. at 619* (quoting *Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982)).*

n183. *Edraonson, 500 U.S. at 619* (citations omitted).

n184. One commentary describing the state of the law at the time of its writing noted: "Since most courts are unyielding in their application of the sound discretion rule, often the only question in these cases is whether the hospital is public or private." Note, The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, *1966 Wash. U. LQ. 485, 492 n.29 (1966).*

n185. See, e.g., *Pariser v. Christian Health Care Sys., Inc., 816 F.2d 1248, 1252 (8th Cir. 1987)* (noting plaintiff alleged private hospital's actions constituted state action); *Babcock v. St. Francis Med. Ctr., 543 N.W.2d 749, 759 (Neb. Ct. App. 1996)* (reciting plaintiffs argument that private hospital "was a public or quasi-public entity and thus that its actions were state actions"); *Mahmoodian v. United Hosp. Ctr., Inc.,*

404 S.E.2d 750, 752 n.2 (W. Va. 1991) (noting plaintiff argued that private hospital was "state actor").

n186. See, e.g., *Levin v. Sinai Hosp., Inc., 46 A.2d 298, 300-01 (Md. 1946)* (holding hospital was private corporation even though "engaged in charitable work" and "operated solely for the benefit of the public"); *Van Campen v. Olean Gen. Hosp., 205 N.ES. 554, 556 (N.Y. App. Div. 1924)* ("That they are engaged in charitable work for the benefit of the public, and thereby affected with a public interest, does not make them public corporations."), affd, *147 N.E. 219 (N. Y. 1925).*

n187. The Hill-Burton Act, *42 U.S.C. 291* (1996).

n188. See, e.g., *Babcock, 543 N. W.2d at 759* (noting receipt of Medicaid and Medicare funds); *Van Campen, 205 N.Y.S. at 556* ("The fact that they may receive a donation from the government to enable them to carry on their work, or funds from a city or county to care for sick, disabled indigent persons, does not affect their character as private institutions."); *Mahmoodian, 404 S.E.2d at 752 n.2* (noting receipt of "funds from governmental sources").

n189. See *Van Campen, 205 N.Y.S. at 556* (holding exemption from liability for negligence to patients did not affect status). With the widespread abrogation of charitable immunity, this justification has disappeared. See supra notes 115-18 and accompanying text for a discussion of the abrogation of charitable immunity.

n190. See, e.g., *Pariser, 816 F.2d at 1252* (holding enjoyment of tax benefits did not amount to state action); *Babcock, 543 N. W.2d at 759* (holding use of tax-free bonds and tax exemption, among other factors, insufficient to establish state action); *Van Campen, 205 N. Y.S. at 556* (holding tax exemption did not affect status).

n191. See, e.g., *Pariser, 816 F.2d at 1252* (holding subjection to pervasive governmental regulation insufficient to establish state action); *Mahmoodian, 404 S.E.2d at 752 n.2* (holding subjection to governmental regulation insufficient).

n192. See, e.g., *Pariser, 816 F.2d at 1252* (holding list of government-related factors did not make a private hospital into a public one); *Mendez v. Belton, 739 F.2d 15, 17-18 (1st Cir. 1984)* (finding panoply of factors did not change hospital's status from private to public); *Loh-Seng Yo v. Cibola Gen. Hosp., 706 F.2d 306, 308 (l Oth Cir. 1983)* (holding plaintiffs cause of action properly dismissed because he had failed to prove that government funding of private hospital changed its private status); *Hodge v. Paoli Mem'l Hosp., 576 F.2d 563, 564 (3d Cir. 1978)* (affirming lower court's dismissal of case because list of government-related factors did not make private hospital into a state actor); *Schlein v. Milford Hosp., Inc., 561 F.2d 427, 428-29 (2d Cir. 1977)* (stating that although private hospital had substantial ties to state, it remained private); *Madry v. Sorel, 558 F.2d 303, 305 (5th Cir. 1977)* (holding that private hospital's use of state land and money did not make it state actor); *Briscoe v. Bock, 540 F.2d 392, 395-96 (8th Cir. 1976)* (holding that government involvement in private hospital did not make it state actor); *Watkins v. Mercy Med. Ctr., 520 F.2d 894, 896 (9th Cir. 1975)* (dismissing plaintiffs case because he had failed to show state involvement in actions of private hospital named as defendant); *Jackson v. Norton-Children's Hosps., Inc., 487 F.2d 502, 502-03 (6th Cir. 1973)* (affirming lower court dismissal of case against private hospital because hospital was private corporation); *Doe v. Bellin Mem'l Hosp., 479 F.2d 756, 761-62 (7th Cir. 1973)* (deciding plaintiff had no cause of action against private hospital because hospital was not acting under color of state law); *Ward v. St. Anthony Hosp., 476 F.2d 671, 674 (lOth Cir. 1973)* (stating private hospital's receipt of federal funds did not make it state actor); *Canady v. Providence Hosp., 903 F. Supp. 125, 126-27 (D.D.C. 1995)*

(noting private hospital's receipt of federal funds did not make it subject to federal constitutional law), affd, *132 F.3d 1480 (D. C. Cir. 1997); Brandt v. St. Vincent Infirmary, 701 S. W.2d 103, 105-06 (Ark. 1985)* (holding private hospital's actions not governed by 14th Amendment even though hospital received government funds); *Bello v. South Shore Hosp., 429 N.E.2d 1011, 1014 (Mass. 1981)* (holding private hospital's actions not performed under color of state law); *Babcock v. St. Francis Med. Ctr., 543 N.W.2d 749, 759 (Neb. Ct. App. 1996)* (holding array of factors did not support determination that private hospital was public institution); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 752 n.2 (W. Va. 1991)* (noting private hospital not state actor or subject to due process requirements); *Fletcher v. Eagle River Mem'l Hosp., Inc., 456 N. W.2d 788, 797 (Wis. 1990)* (stating plaintiff's claim of private hospital's receipt of government funds did not make it state actor). For early cases, see, for example, *Edson v. Griffin Hosp., 144 A.2d 341, 343-44 (Conn. Super. Ct. 1958)* (stating private hospital's receipt of state aid did not make hospital public); *West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293, 296-97 (Fla. 1953)* (stating private hospital was private corporation despite government involvement in some hospital affairs); *Levin v. Sinai Hosp., Inc., 46 A.2d 298, 300-01 (Md. 1946)* (stating private hospital not public even though it performed charitable work and was opened for use by public); *Van Campen v. Olean Gen. Hosp., 205 N.Y.S. 554, 556 (N. Y. App. Div. 1924)* (noting government contributions to private hospital did not change hospital's status to public), aff'd, *147 N.E. 219 (N. Y. 1925).*

Initially, the Fourth Circuit held that such factors did support a finding of state action. See *Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826, 828 (4th Cir. 1969)* (explaining that receipt of Hill-Burton funds make private hospital constrained by Federal Constitution); *Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 967-68 (4th Cir. 1963)* (noting participation in Hill-Burton program makes hospital state actor, subject to constitutional commands). In 1982, the

Fourth Circuit reversed itself in light of Supreme Court precedent in *Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)* and subsequent decisions. See *Modaber v. Culpeper Mem'l Hosp., Inc., 674 F.2d 1023, 1025-26 (4th Cir. 1982)* (holding receipt of Hill-Burton funds by private hospital does not make it state actor). See also *Mahmoodian, 404 S.E.2d at 752 n.2* (recognizing overruling of earlier line of cases).

A few courts, however, have viewed these factors as supporting a third classification of hospitals - "quasi-public" hospitals. Based on this finding, those courts have justified greater judicial review and have treated quasi-public hospitals much the same as public hospitals. See *Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992)* (reiterating that private hospital classified as quasi-public when it received government money); *Storrs v. Lutheran Hosps. & Homes Soc'y, Inc., 609 P.2d 24, 28 (Alaska 1980)* (holding private hospital "quasi-public" and must afford due process); *Brandt v. St. Vincent Infirmary, 701 S. W.2d 103, 107-08 (Ark. 1985)* (Dudley, J., concurring) (stating private hospital quasi-public and, therefore, required to afford doctors due process); *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 570 (Haw. 1972)* (noting receipt of government funds demanded private hospital comply with due process standards); cf. *Allison v. Centre Cmty. Hosp., 604 A.2d 294, 297 (Pa. Commw. Ct. 1992)* (discussing quasi-public hospital category, but holding that all hospitals should be treated same).

n193. See infra notes 194-238 and accompanying text for a discussion of "rule of nonreview."

n194. See *G ianetti v. Norwalk Hosp., 557 A.2d 1249, 1255-56 (Conn. 1989)* (recognizing nonreview doctrine but declining to apply it to contractual dispute); *Barrows v. Northwestern Mem'l Hosp., 525 N.E.2d 50, 52 (Ill. 1988)* (adhering to doctrine of nonreview). See also *Samuel v.*

Herrick Mem'l Hosp., 201 F.3d 830, 835 (6th Cir. 2000) (applying "nonreviewability rule"); *Mahmoodian vo United Hosp. Ctr., Inc., 404 S.E.2d 750, 755 n.8 (W. Va. 1991)* (detailing jurisdictions adopting and sources discussing doctrine of nonreview); Groseclose, supra note 92, at 10-11 (discussing rule of nonreview).

n195. *Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59, 63 (D.D.C. 1963);* accord *Hoffman v. Garden City Hosp.-Osteopathic, 321 N. W.2d 810, 813 (Mich. Ct. App. 1982)* (quoting Shulman); *Sarin v. Samaritan Health Ctr., 440 N. W.2d 80, 82 (Mich. Ct. App. 1989)* (quoting Hoffman and Shulman); *Winston v. American Med. Int'l, Inc., 930 S. W.2d 945, 956 (Tex. Ct. App. 1996)* (citing numerous Texas cases that private hospital's decision not subject to review); *Tigua Gen. Hosp., Inc. v. Feuerberg, 645 S. W.2d 575, 578 (Tex. Ct. App. 1982)* (finding decision of private hospital nonreviewable).

n196. See, e.g., *Moore v. Andalusia Hosp., Inc., 224 So. 2d 617, 619 (Ala. 1969)* (concluding private hospital decisions not subject to review); *Scappatura v. Baptist Hosp., 584 P.2d 1195, 1199 (Ariz. Ct. App. 1978)* (declaring no judicial review unless hospital violated bylaws); *Barrows v. Northwestern Mem'l Hosp., 525 N.E.2d 50, 51-55 (Ill. 1988)* (refusing to follow trend of judicial review); *Pepple v. Parkview Mem'l Hosp., Inc., 536 N.E.2d 274, 276 (Ind. 1989)* (declaring review only allowed if sufficient nexus exists between private hospital and state); *Long v. Chelsea Cmty. Hosp., 557 N. W.2d 157, 161-62 (Mich. Ct. App. 1996)* (adopting limited rule of nonreview in contract cases); *Sarin v. Samaritan Health Ctr., 440 N. W.2d 80, 82 (Mich. Ct. App. 1989)* (adopting rule of nonreview for private hospital); *Medical Ctr. Hosps. v. Terzis, 367 S.E.2d 728, 730 (Va. 1988)* (declaring merits of hospital's conclusions nonreviewable); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 755 & n.8 (W. Va. 1991)* (declaring support of nonreview in case law). See also *Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368-69 (Me. 1988)* (following

rule of nonreview but suggesting on different facts it might reconsider the rule).

n197. See infra notes 194-282 for a discussion of the history of the rule of nonreview and its limitations.

n198. *Anonymous, 90 Eng. Rep. 331 (K.B. 1687).*

n199. See, e.g., *People ex rel. Replogle v. Julia F. Burnham Hosp., 71 Ill. App. 246, 249-50 (1897)* (finding fully within hospital's power to adopt bylaws that are reasonable and consistent with general purposes of the corporation); *Harris v. Thomas, 217 S. W. 1068, 1076-77 (Tex. Civ. App. 1920)* (arguing that courts of equity generally will not interfere with decisions of voluntary associations); cf. *Hayman v. City of Galveston, 273 U.S. 414, 417 (1927)* (involving public hospital and allowing regulation excluding osteopath where regulation was not arbitrary or unreasonable).

n200. See *Replogle, 71 Ill. App. at249-50; Van Campen v. Olean Gen. Hosp., 205 N.Y.So 554, 557(N.Y. App. Div. 1924)* (utilizing general corporation law to justify deference to board's decision), affd, *147 N.E. 219 (N. Y. 1925).*

n201. *Replogle, 71 Ill. App. at 250.*

n202. *217 S. W. 1068 (Tex. Civ. App. 1920).*

n203. *193 N.W. 994 (Wis. 1923).*

n204. *Harris, 217S.W. at 1069-70.*

n205. *Id. at 1074.*

n206. *Id. at 1076o77.*

n207. *ld. at 1077.*

n208. *Id. at 1078.*

n209. *193 N.W. 994 (Wis. 1923).*

n210. *Wolf 193 N.W. at 995.*

n211. *Id. at 995-96.*

n212. *Id. at 996.* See also *Johnson v. City of Ripon, 47 N. W.2d 328, 329-30 (Wis. 1951)* (contrasting private hospital with public hospital and acknowledging Wolt's holding that private hospitals have right to exclude physicians).

n213. *Wolf, 193 N.W. at 996.*

n214. *205 N.ES. 554 (N.E App. Div. 1924),* affd, *147 N.E. 219(N.Y. 1925).*

n215. *Van Campen, 205 N.ES. at 556.*

n216. *Id. at 558.*

n217. *ld. at 555.*

n218. *Id. at 556.*

n219. *Id. at 557-58.* See also *Alpert v. Bd. of Governors, 145 N.Y.S.2d 534, 538-39 (N. Y. App. Div. 1955)(citing* Van Campen, contrasting public hospital with private hospital, and holding that public hospital may not arbitrarily or unreasonably exclude physician).

n220. *194 S.E. 65 (S.C. 1937).*

n221. *Strauss, 194 S.E. at65.*

n222. Id.

n223. Id.

n224. *Van Campen v. Olean Gen. Hosp., 205 N.Y.S. 554 (N.Y. App. Div. 1924),* affd, *147 N.E. 219 (N.Y. 1925). See* supra notes 214-19 and accompanying text for a discussion of Van Campen.

n225. *158 S. W.2d 159 (Ky. 1942).*

n226. *Hughes, 158 S. W.2d at 160.*

n227. *Id. at 161-62.*

n228. *Id. at 162.*

n229.46 *A.2d 298 (Md. 1946).*

n230. *Levin, 46 A.2d at 300-01.*

n231. *Id. at 303, 301.*

n232.52 *N.W.2d 701 (Iowa 1952).*

n233. *Natale, 52 N. W.2d at 704.*

n234. *Id. at 706.*

n235. *Id. at 707.*

n236. Id.

n237. *Id. at 709.*

n238. *Natale, 52 N. W.2d at 709.* See infra notes 414-25 and accompanying text for a discussion of the distinction between hospital bylaws and medical staff bylaws. For other early courts following the rule of nonreview see, e.g, *Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59, 63 (D.D.C.*

1963) (embracing the rule of nonreview); *Edson v. Griffin Hosp., 144 A.2d 341, 345 (Conn. Super. Ct. 1958)* (recognizing general rule that hospitals, like corporations, have right to regulate affairs without interference); *West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293, 297 (Fla. 1953)* (determining non-profit corporation has right to manage own affairs).

n239. *Van Campen v. Olean Gen. Hosp., 205 N.Y.S. 554, 556 (N.Y. App. Div. 1924)*, affd, *147 N.E. 219 (N.Y. 1925).*

n240. *State ex rel. Wolf, 193 N.W. 994, 996 (Wis. 1923).*

n241. *Levin v. Sinai Hosp. of Baltimore City, Inc., 46 A.2d 298, 301 (Md. 1946).* See infra notes 414-25 and accompanying text for a discussion of the distinction between hospital bylaws and medical staff bylaws.

n242. *Natale, 52 N. W.2d at 709.*

n243. Id.

n244. *121 A. 475 (Md. 1923).*

n245. *Stevens, 121 A. at 476.*

n246. *Id. at 475-76.*

n247. *Id. at 476-77.*

n248. *Id. at 478-79.* See also *Emergency Hosp. v. Stevens, 126 A. 101, 103 (Md. 1924)* (discussing injunction).

n249. *Van Campen v. Olean Gen. Hosp., 205 N.ES. 554 (N.Y. App. Div. 1924)*, affd, *147 N.E. 219(N.Y. 1925). See* supra notes 216-21 and accompanying text for a discussion of Van Campen.

n250. *Levin v. Sinai Hosp. Inc., of Baltimore City, 46 A.2d 298 (Md. 1946).* See supra notes 229-31 and accompanying text for a discussion of Levin.

n251. Natale v. Sisters of Mercy, 52 N. W.2d 701 (Iowa 1952). See supra notes 232-38 and accompanying text for a discussion of Natale.

n252. In *Glass v. Doctors Hospital Inc., 131 A.2d 254 (Md. 1957), the* Maryland Supreme Court viewed refusal to renew privileges as an exclusion case rather than a dismissal case. *Id. at 263.* Consequently, the medical staff bylaws notice and hearing requirements, necessary for dismissal, did not apply. Id. The court held that the physician "was merely notified that his year to year privileges would not be renewed when they expired. In such case no notice, other than that given him, and no hearing are required." Id.

n253. *Natale v. Sisters of Mercy, 52 N.W.2d 701, 704 (Iowa 1952).* See also *Levin v. Sinai Hosp., 46 A.2d 298, 303 (Md. 1946)* (involving no limitation on privileges); *Van Campen v. Olean Gen. Hosp., 205 N.Y.S. 554, 555 (N. Y. App. Div. 1924)* (involving limitation on existing privileges), affd, *147 N.E. 219 (N. Y. 1929).*

n254. See *Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 737-38 (Ill. 1989)* (finding exception to nonreview rule when privileges pre-existing). See also *Chessick v. Sherman Hosp. Ass'n, 546 N.E.2d 1153, 1156 (Ill. App. Ct. 1989)* (finding exception where privileges pre-existing and where hospital failed to follow bylaws); *Claydon v. Sisters of the Third Order of St. Francis, 536 N.E.2d 209, 210-11 (Ill. App. Ct. 1989)* (referring to "limitation" of general rule). But see *Medical Ctr. Hosp. v. Terzis, 367 S.E.2d 728, 730 (Va. 1988)* (finding no difference between refusal to grant privileges and suspension of privileges).

n255. See, e.g., *Balkissoon v. Capitol Hill Hosp., 558 A.2d 304, 307 (D.C. Cir. 1989)* (stating "hospital must still afford appellant at least all of the process and protections encompassed in its bylaws"); *Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 739, 741 (Ill. 1989)* (stating "basic protections include notice and a fair hearing"); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 759 (Neb. Ct. App. 1996)* (allowing review to determine compliance and fairness); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 964 (Utah 1998)* (limiting review to fairness of peer review and compliance with bylaws); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 755 (W. Va. 1991)* (limiting review to compliance with bylaws, fair hearing, and notice).

n256. As one might expect, probably a majority of the reported cases are an application of the "exception" and not the rule. Of course it is not surprising that the part of the rule which allows judicial review would be more prevalent in reported cases than the part of the rule denying review.

n257. See infra notes 283-303 and accompanying text for a discussion of the contract theory for judicial review and decisions affecting existing staff membership or clinical privileges.

n258. *Van Campen v. Olean Gen. Hosp., 205 N.ES. 554, 557(N.Y. App. Div. 1924)*, aff'd, *147 N.E. 219(N.Y. 1929).*

n259. But see *Loewinthan v. Beth David Hosp., 9 N. Y.S.2d 367, 370 (N. Y. Sup. Ct. 1938)* (holding allegation that hospital violated its bylaws in dismissing physician insufficient where no contractual relationship shown).

n260. *Levin v. Sinai Hosp. of Baltimore City, Inc., 46 A.2d 298, 301 (Md. 1946).*

n261. 222 F. *Supp. 59 (D.D.C. 1963).*

n262. *Shulman, 222 F. Supp. at 63.*

n263. See *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr., 73 Cal. Rptr. 2d 695, 699 n.2 (Cal. Ct. App. 1998)* (stating that medical staff is separate legal entity, an unincorporated association); *Corleto v. Shore Mem'l Hosp., 350 A.2d 534, 539 (N.J. Super Ct. 1975)* (concluding medical staff is unincorporated association capable of being sued); *Manczur v. Southside Hosp., 183 N. Y.S. 2d 960, 961-62 (N. Y. Sup. Ct. 1959)* (holding medical staff is unincorporated association); *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., 245 N.W.2d 472, 474 (S.D. 1976)* (finding medical staff is unincorporated association with standing to bring declaratory judgment action). See also Isele, supra note 68, at 3-4 (stating medical staff is separate legal entity, usually an unincorporated association). See infra notes 414-25 for a discussion of the distinction between a hospital and its medical staff.

n264. *Van Campen v. Olean Gen. Hosp., 205 N.ES. 554, 557(N.Y. App. Div. 1924),* affd, *147 N.E. 219(N.Y. 1929).* See supra notes 214-19 and accompanying text for a discussion of Van Campen.

n265. *Levin v. Sinai Hosp., 46 A.2d 298, 301 (Md. 1946).* See supra notes 229-31 and accompanying text for a discussion of Levin.

n266. *Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59 (D.D.C. 1963).* See supra notes 261-62 and accompanying text for a discussion of Shulman.

n267. *Natale v. Sisters of Mercy, 52 N.W.2d 701, 709 (Iowa 1952).* See infra notes 413-47 and accompanying text for a discussion of the distinction between the hospital and medical staff and whether the medical staff bylaws should be binding on the hospital.

n268. See *Barrows v. Northwestern Mem'l Hosp., 525 N.E.2d 50, 55 (Ill. 1988)* (declining to review hospital's refusal to make staff appointment); *Bello v. South Shore Hosp., 429 N.E.2d 1011, 1016 (Mass. 1981)* (finding no support for proposition that non-staff members have a right to challenge application of the bylaws); *Mahmoodian v. United Hosp. Ctr. Inc., 404 S.E.2d 750, 755 (W. Va. 1991)* (allowing review involving existing privileges).

n269. See *Sarin v. Samaritan Health Cir., 440 N. W.2d 80, 83 (Mich. Ct. App. 1989)* (concluding no review because would involve review of boards substantive decisions). See also *Samuel v. Herrick Mem'l Hosp., 201 F.3d 830, 836 (6th Cir. 2000)* (following Satin and applying "Michigan's flat rule against judicial intervention"); *Long v. Chelsea Cmty. Hosp., 557 N.W.2d 157, 161-62 (Mich. Ct. App. 1996)(following* Sarin).

n270. See *Samuel, 201 F.3d at 834-35 (6th Cir. 2000)* (considering discrimination and antitrust claims but finding no jurisdiction to consider tortious interference with contract claim); *Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 121 (3d Cir. 1998)* (stating physician may state claim under Americans with Disabilities Act); *Muzquiz v. W.A. Foote Mem'l Hosp., Inc., 70 F.3d 422, 428-30 (6th Cir. 1995)* (applying Michigan law and rejecting breach of contract claim but considering separately and rejecting on facts Title VII and antitrust theories); *Ponca City Hosp. Inc. v. Murphree, 545 P.2d 738, 742 (Okla. 1976)* (supporting judicial review of claims of race, sex, or age discrimination). Antitrust claims are often alleged in staff privileging cases, but they are rarely successful. See Furrow, supra note 116, at 10-16, at 623 & nn.5-7, 10-25 for a good general discussion of antitrust claims.

n271. *557 N.W.2d 157(Mich. Ct. App. 1996).*

n272. *Long, 557 N.W.2d at 161-62.*

n273. See *Cooper v. Delaware Valley Med. Ctr., 654 A.2d 547, 552 (Pa. 1995)* (allowing damages under tort and contract theory arising out of peer review); *Saad v. Sacred Heart Hosp., 700 A.2d 604, 606-07 (Pa. Commw. Ct. 1997)* (finding exception to nonreview where claim based on tort or contract); el. *Rosenberg v. Holy Redeemer Hosp., 506 A.2d 408, 412 (Pa. Super. Ct. 1986)* (stating private hospital's staffing decisions not subject to judicial review).

n274. See Groseclose, supra note 92, at 14 ("A persuasive argument is thereby provided that the distinction between public and private hospitals is abolished and a physician cannot be denied access to either a public or private hospital without constitutional due process."); Karen G. Seimetz, Note, Medical Staff Membership Decisions: Judicial Intervention, *1985 U. Ill. L. Rev. 473, 483-84* (finding little difference between public and private hospitals and arguing impact of unfair staffing decision the same). See also *Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992)* (noting trend affording judicial review so that no hospital, public or private, adopts rule that exclude arbitrary or capriciously); *Storrs v. Lutheran Hosps. & Homes Soc'y, Inc., 609 P.2d 24, 28 (Alaska 1980)* (holding private hospital "quasi-public" and must afford due process because it was only hospital serving community and enjoyed significant government funding); *Brandt v. St. Vincent Infirmary, 701 S. W.2d 103, 107 (Ark. 1985)* (Dudley, J., concurring) (arguing private hospital should be considered "quasi-public"); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 752 (W. Va. 1991)* (finding public/private dichotomy distracting from more significant issues; noting scope of judicial review essentially the same for both private and public hospitals); Of. *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 570 (Haw. 1972)* (stating if fiduciary trust view accepted, public/private/quasi-public distinction "becomes meaningless").

n275. Groseclose, supra note 92, at 3-4.

n276. Seimetz, supra note 274, at 483-84.

n277. Id. at 501.

n278. See *Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991)* (stating constitutional limits generally not applicable to private entities); *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974)* (holding private conduct not subject to Fourteenth Amendment scrutiny).

n279. See infra Part III.A.4 for a discussion of courts rejecting public/private distinction.

n280. See infra Part III.B for a discussion of courts using a contract theory to reject the public/private distinction.

n281. See infra Part III.C for a discussion of courts' use of common law and public policy theories to impose more extensive judicial review.

n282. See infra Part III.D for a discussion of courts' use of state statutes to define the scope of judicial review.

n283. See infra Part III.B.1 for a discussion of view that medical staff bylaws constitute a contract between a physician and the hospital.

n284. See infra Part III.B.1 for a discussion of courts' view that bylaws create an enforceable contract between a physician and a hospital.

n285. See, e.g., *Babcock v. St. Francis Med. Ctr., 543 N.W.2d 749, 760 (Neb. Ct. App. 1996)* (noting "obligation to follow its own bylaws can stem from a contractual

relationship"); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 964 (Utah 1998)* (limiting review to breach of contract based on bylaws).

n286. See supra note 256 and accompanying text for a discussion of the exclusion/expulsion distinction.

n287. See *Bello v. South Shore Hosp., 429 N.E.2d 1011, 1016 (Mass. 1981)* (stating physician applicant had no standing to challenge compliance with bylaws); Groseclose, supra note 92, at 25-26 & n. 169 (discussing nature of physician's relationship with hospital). But see infra note 346-64 and accompanying text for argument that applicants should have contractual rights.

n288. See *Pariser v. Christian Health Care Sys., Inc., 816 F.2d 1248, 1251 (8th Cir. 1987)* (applying Illinois law); *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1184-89 (E.D. Cal. 1998)* (predicting California law); *Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361, 1370-71 (N.D. Iowa 1992)* (predicting Iowa law); *Posner v. Lankenau Hosp., 645 F. Supp. 1102, 1106 (E.D. Pa. 1986)* (finding bylaws create contract between hospital and doctor); *Eidelson v. Archer, 645 P.2d 171, 178 (Alaska 1982)* (holding bylaws form part of contract); *Samaritan Health Sys. v. Superior Court, 981 P.2d 584, 588 (Ariz. Ct. App. 1998)* (holding bylaws create contract); *Bock v. John C. Lincoln Hosp., 702 P.2d 253, 258 (Ariz. Ct. App. 1985)* (finding parties agree bylaws create contract); *Greenberg v. Mount Sinai Med. Ctr., Inc., 629 So. 2d 252, 257 (Fla. Dist. Ct. App. 1993)* (finding bylaws, if approved by governing board, create contract); *Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986)* (following majority view that bylaws, approved by governing board, create binding contract); *Garibaldi v. Applebaum, 653 N.E.2d 42, 45 (Ill. App. Ct. 1995)* (declaring bylaws part of contractual relationship); *Pepple v. Parkview Mem'l Hosp., Inc., 536 N.E.2d 274, 276 (Ind. 1989)* (agreeing with lower court that bylaws can constitute

contract); *Terre Haute Reg 'l Hosp., Inc. v. El-lssa, 470 N.E.2d 1371, 1377 (Ind. Ct. App. 1984)* (holding bylaws can constitute contract); *Bartley v. Eastern Maine Med. Ctr., 617 A.2d 1020, 1021 (Me. 1992)* (agreeing bylaws create enforceable contract); *Bhatnagar v. Mid-Maine Med. Ctr., 510 A.2d 233, 234 (Me. 1986)* (finding bylaws create enforceable contract); *Anne Arundel Gen. Hosp., Inc. v. O'Brien, 432 A.2d 483, 488 (Md. Ct. Spec. App. 1981)* (finding it "well settled" bylaws create enforceable contract); *Campbell v. St. Mary's Hosp., 252 N.W.2d 581, 586-87 (Minn. 1977)* (concluding under bylaws doctor entitled to "contractual due process rights"); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 760 (Neb. Ct. App. 1996)* (determining obligation to follow bylaws stems from contractual relationship); *Joseph v. Passaic Hosp. Ass'n, 118 A.2d 696, 700 (N.J. Super Ct. App. Div. 1955)* (finding breach of contract based on hospital's constitution and bylaws); *Falk v. Anesthesia Assocs. of Jamacia, 644 N. Y.S.2d 237, 239-40 (No Y. App. Div. 1996)* (rejecting contention that bylaws do not create contract); *Chuz v. St. Vincent's Hosp., 589 N.Y.S.2d 17, 18 (N.Y. App. Div. 1992)* (acknowledging bylaws may create contract); *Virmani v. Presbyterian Health Servs. Corp., 488 S.E.2d 284, 287-88 (N.C. Ct. App. 1997)* (holding if offer and acceptance contemplated within bylaws, contract exists); *Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 149 A.2d 456, 458-59 (Pa. I959)* (finding directors' approval of bylaws resulted in contractual relationship between hospital and staff); *Miller v. Indiana Hosp., 419 A.2d 1191, 1193 (Pa. Super Ct. 1980)* (stating "bylaws of a hospital constitute the terms of a legally binding contract"); *Lyons v. St. Vincent Health Ctr., 731 A.2d 206, 210-11 (Pa. Commw. Ct. 1999)* (concluding bylaws part of contract between doctor and hospital); *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., Inc., 245 N. W.2d 472, 474 (S.D. 1976)* (finding, through analogy to corporate bylaws, hospital bylaws create contract); *Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805S. W.2d 756, 759 (Tenn. 1991)* (agreeing, despite split in jurisdictions, bylaws constitute contract); *East Texas Med. Ctr. Cancer Inst. v.*

Anderson, 991 S.W.2d 55, 62-63 (Tex. Ct. App. 1998) (concluding bylaws create contractual due process rights); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 966 (Utah 1998)* (discussing contractual obligations under bylaws); *Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, I076-77 (Utah 1991)* (stating bylaws are "in essence, a contract between the hospital and physician"); *Houston v. Intermountain Health Care, Inc., 933 P.2d 403, 408 (Utah Ct. App. 1997)* (agreeing bylaws create contract between hospital and physician); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 755 (W. Va. 1991)* (under breach of contract principles, hospital must follow medical staff bylaws); *Bass v. Ambrosius, 520 N. W.2d 625, 627-29 (Wis. Ct. App. 1994)* (discussing how bylaws create contract). See also *Clemons v. Fairview Med. Ctr., Inc., 449 So. 2d 788, 790 (Ala. 1984)* (breach of contract claim based on violation of medical staff bylaws upheld); *Balkissoon v. Capitol Hill Hosp., 558 A.2d 304, 308 (D. C. Cir. 1989)* (bylaws may create contractual rights); *Clough v. Adventist Health Sys., Inc., 780 P.2d 627, 632 (N.M. 1989)* (accepting district court's holding and parties' assumption that bylaws created implied contract).

Several courts have faced the issue but have not decided it. See *Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100, 1103 (Colo. Ct. App. 1981)* (assuming arguendo that bylaws were contract); *Duby v. Jordan Hosp., 341 N.E.2d 876, 879 (Mass. 1976)* (assuming without deciding that bylaws give rise to contract); *Wong v. Stripling, 700 So. 2d 296, 300-02 (Miss. 1997)* (dismissing breach of contract claim based on violation of bylaws on collateral estoppel grounds); *Gelbard v. Genesee Hosp., 664 N.E.2d 1240, 1242 (N. Y. 1996)* (expressing that question would not be reached until plaintiff exhausted administrative remedies); *Bouquett v. St. Elizabeth Corp., 538 N. E. 2d I 13, I 15-16 (Ohio 1989)* (assuming without deciding that bylaws binding contract); *Ponca City Hosp., Inc. v. Murphree, 545 P.2d 738, 742 (Okla. 1976)* (acknowledging the "bylaws create contract" issue but failing to address it because plaintiff brought suit in equity

seeking injunction); *Medical Ctr. Hosps. v. Terzis, 367 S.E.2d 728, 729 (Va. 1988)* (assuming but expressly not deciding the issue of whether bylaws constitute contracts).

n289. See, e.g., *Gianetti v. Norwalk Hosp., 557 A.2d 1249, 1252-55 (Conn. 1989)* (stating that bylaws are subject to judicial review because they are "an integral part of the contractual relationship" between physician and hospital). See also *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 239 n.25 (Conn. 1994)* (citing Gianetti and finding bylaws create contract).

n290. See, e.g., *Monroe v. AMI Hosp., Inc., 877 F. Supp. 1022, 1029 n.5 (S.D. Tex. 1994)* (interpreting Texas law that bylaws do not constitute contract); *Tredrea v. Anesthesia & Analgesia, P.C., 584 N. W.2d 276, 284-87 (Iowa 1998)* (discussing requirement for bylaws to constitute contract); Sullivan v. Baptist Mem'l Hosp. - *Golden Triangle, Inc., 722 So. 2d 675, 680-81 (Miss. 1998)* (granting privileges does not create contract); *Zipper v. Health Midwest, 978 S. W.2d 398, 415-17 (Mo. Ct. App. 1998)* (holding, in case of first impression, bylaws do not create contract); *Manczur v. Southside Hosp., 183 N. Y.S.2d 960, 961-62 (N. Y. Sup. Ct. 1959)* (finding bylaws created procedural rules for governing staff members not binding contract); *Munoz v. Flower Hosp., 507 N.E.2d 360, 365 (Ohio Ct. App. 1985)* (finding no mutuality of obligation, thus, bylaws do not create contract); *Weary vo Baylor Univ. Hosp., 360 S. W.2d 895, 896-97 (Tex. Civ. App. 1962)* (finding bylaws do not create contract). See also *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1001 (N.D. Ga. 1992)* (bylaws not contract but enforceable); *St. Mary's Hosp., Inc. v. Radiology Profll Corp., 421 S.E.2d 731, 736 (Ga. Ct. App. 1992)* (holding staff bylaws alone confer no contractual rights but enforceable in tort); *Keskin v. Munster Med. Research Found., 580 N.E. 2d 354, 359 (Ind. Ct. App. 1991)* (finding although bylaws may be contract, not always contract); *Holt v. Good Samaritan Hosp. & Health Ctr., 590 N.E.2d 1318, 1322 (Ohio Ct. App. 1990)*

(finding staff bylaws constitute contract only if intent by both parties to be bound); John Hulston, et al., Do Hospital Medical Staff Bylaws Create a Contract?, *51 J. Mo. B. 352, 355* (Nov./Dec. 1995) (arguing bylaws should not be considered contract giving rise to cause of action for damages, but should be enforceable in action for injunctive relief); Groseclose, supra note 92, at 28 (arguing that "the existence of a contract in this setting is pure fiction"); cf. *Murdoch v. Knollwood Park Hosp., 585 So. 2d 873, 876 (Ala. 1991)* (stating court "not convinced that the hospital bylaws created a binding contract" but not deciding issue); *Todd v. Physicians & Surgeons Cmty. Hosp., Inc., 302 S.E.2d 378, 381 (Ga. Ct. App. 1983)* (noting in dicta district court holding that medical staff bylaws do not constitute contract); *Sarin v. Samaritan Health Ctr., 440 N. W.2d 80, 82 (Mich. Ct. App. 1989)* (refraining from deciding whether bylaws create contract and dismissing breach of contract claim on grounds that court may not review such claim). In *State ex rel. Mississippi Ethics Commission v. Aseme, 583 So. 2d 955 (Miss. 1991), the* Mississippi Supreme Court in a non-credentialing case held that a physician who has been granted staff privileges does not have a contractual relationship with the hospital, *ld. at 960.*

n291.52 *N.W.2d 701 (Iowa 1952).*

n292. See *Gonzalez v. San Jacinto Methodist Hosp., 880 S. W.2d 436, 438-39 (Tex. Ct. App. 1994)* (holding plaintiff physician could have no vested fights stemming from medical staffs bylaws); cf. *lshak v. Fallston Gen. Hosp. & Nursing Ctr., 438 A.2d 1369, 1372 (Md. Ct. Spec. App. 1982)* (noting argument that only hospital bylaws are relevant and not medical staff bylaws); *Tredrea v. Anesthesia & Analgesia, P.C., 584 N. W.2d 276, 284-87 (Iowa 1998)* (distinguishing hospital's bylaws from medical staff bylaws). But see *Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805 S.W.2d 756, 759 (Tenn. 1991)* (rejecting distinction).

n293. *l18 A.2d 696, 700 (N.J. Super Ct. App. Div. 1955).*

n294. *149 A.2d 456 (Pa. 1959).*

n295. *Joseph, 118 A.2d at 697-98.*

n296. *Id. at 698.*

n297. *Id. at 700.*

n298. *Berberian, 149 A.2d at 456.*

n299. *Id. at 458-59.* See also *id. at 459* (physician and hospital had "entered into a contract whereof the provisions of the staff by-laws, as approved by the hospital's board of directors, constitute the legally binding terms"). But see *id. at 461* (Bell, J., dissenting) (stating that staff bylaws not binding on board).

n300. See, e.g., *Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990)* (binding board of directors to provisions of bylaws for benefit of shareholders); *In re Estate of Hall, 731 A.2d 617, 623 (Pa. Super. Ct. 1999)* (finding corporate bylaws enforceable upon parties); *Hall v. Tennessee Dressed Beef Co., 957 S.W. 2d 536, 539 (Tenn. 1997)* (finding corporate bylaws enforceable upon parties).

n301. See infra note 302 and accompanying text for a discussion of the reasoning of courts that have found bylaws rendered meaningless if not enforceable.

n302. *Bass v. Arnbrosius, 520 N.W. 625, 627 (Wis. Ct. App. 1994)* (quoting Willaim Shakespeare, Macbeth, act V, scene v, lines 27-28). See also *Lewisburg Cmty. Hosp. v. Alfredson, 805 S.W.2d 756, 759 (Tenn. 1991)* (stating that "to suggest that the hospital has no legal duty to follow its own bylaws would be to reduce the bylaws to meaningless mouthing of words"); *Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113, 115 (Ohio 1989)* (stating "cases holding that a hospital is bound by its staff bylaws base their decisions on

the reasoning that if the hospital is not bound by the bylaws, then essentially the bylaws would be meaningless") (quoting *Munoz v. Flower Hosp., 507 N.E.2d 360, 364 (Ohio Ct. App. 1985)).*

n303. See, e.g., *Zipper v. Health Midwest, 978 S. W.2d 398, 416 (Mo. Ct. App. 1998)* (discussing view that bylaws lack necessary elements to constitute a contract).

n304. *Restatement (Second) of Contracts 1* (1981); accord, e.g., *Cook v. Cook, 691 P.2d 664, 667 (Ariz. 1984)* (stating "sine qua non of any contract is the exchange of promises"); *Atwood v. Western Constr., Inc., 923 P.2d 479, 483 (Idaho Ct. App. 1996)* (defining contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"); *Cederstrand v. Lutheran Bhd., 117 N. W.2d 213, 219 (Minn. 1962)* (stating "a contract is a legally enforceable promise); *Fitzpatrick v. Vermont State Treasurer, 475 A.2d 1074, 1077 (Vt. 1984)* (defining special contract as "one with perculiar provisions or stipulations not found in the ordinary contract relating to the same subject matter, and which, if omitted, the law will not supply") (citations omitted)

n305. 1 Joseph M. Perillo, Corbin on Contracts 1.3, at 9 (rev. ed. 1993) (quoting Uniform Commercial Code 1-201).

n306. The authorities are quick to point out that not all enforceable contracts satisfy these requirements. For example, the Restatement (Second) on Contracts recognizes a special category of contracts, "formal contracts," that may be formed without a bargain, manifestation of assent, or consideration. *Restatement (Second) of Contracts 6,* 17 & cmt. a (1981). Even some "atypical" "informal" contracts are binding even though they are not part of a bargain. See id. 17 cmt. e.

n307. See *Ga. Code Ann. 13-3-1* (1982) (stating similar requirements); *Farrington v. Tennessee, 95 U.S. 679, 685 (1877)* (requiring "parties, consent, consideration, and obligation"); *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1186 (E.D. Cal. 1998)* (requiring consent, lawful object, sufficient cause or consideration, and parties capable of contracting); *Gray v. Reynolds, 514 So. 2d 973, 975 (Ala. 1987)* (requiring agreement, consideration, two or more parties, legal object, and legal capacity); *Westbrook v. Westbrook, 364 S.E.2d 523, 527 (Va. Ct. App. 1988)* (requiring "competent parties, legal subject matter, valuable consideration and mutual consent"); *Restatement (Second) of Contracts 12,* 17 (1981) (requiring capacity and bargaining with mutual assent to contract); 1 Samuel Williston & Richard A. Lord, Williston on Contracts 3:2, at 200-02 (4th ed. 1990) (detailing the requirements for formation of informal contract). See also *Peterson v. Trailways, Inc., 555 F. Supp. 827, 830 (D. Colo. 1983)* (requiring competency of parties, subject matter, legal consideration, mutuality of agreement, mutuality of obligation); *Thomas v. Leja, 468 N. W.2d 58, 60 (Mich. Ct. App. 1991)* (stating essential elements of valid contract include competency of parties, proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation); *Zipper v. Health Midwest, 978 S. W.2d 398, 416 (Mo. Ct. App. 1998)* (stating essential elements of contract according to Missouri law are competency of parties, proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation). Some courts identify the elements as offer, acceptance, and consideration. See, e.g., *Tinucci v. R.V. Evans Co., 989 S. W.2d 181, 184 (Mo. Ct. App. 1998)* (noting offer must be "definite" and acceptance must be "unequivocal"). See also *Muchesko v. Muchesko, 955 P.2d 21, 24 (Ariz. Ct. App. 1997)* (requiring offer, acceptance, consideration, sufficiently specific statement of obligations, mutual consent).

The Restatement (Second) of Contracts and other authorities specifically reject the requirement of "mutuality of obligation." See *Restatement (Second) of Contracts 79(c) &* cmt. f (1981) (concluding that if requirement of consideration met, no need for mutuality of obligation); 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, Corbin on Contracts 6.1, at 197 (rev. ed. 1995) (stating "requirement of mutuality of obligation is now widely discredited").

n308. See *Restatement (Second) of Contracts* 22 (1981) (requiring offer and acceptance for assent).

n309. 1 Perillo, supra note 305, 1.1, at 2.

n310. See *Restatement (Second) of Contracts 11* illus. 1 (1981) (illustrating the following example: "A becomes a member of an unincorporated society, and by so doing promises to pay dues to the society. He is bound by a contract."). See also infra notes 414-25 and accompanying text for a discussion of the nature of the medical staff as an entity.

n311. See generally JCAH, Guidelines for Bylaws, supra note 92. See also *Lyons v. St. Vincent Health Ctr., 731 A.2d 206, 210 (Pa. Commw. Ct. 1999)* (explaining hospital's staffing procedures outlined in bylaws); Hulston, et al., supra note 290, at 352. For examples of bylaws see Yale-New Haven Hosp. Bylaws, supra note 92; Presbyterian Hosp. Bylaws, supra note 92; HCWP Model Bylaws, supra note 92; UTMB Bylaws, supra note 92; Oregon Health Sciences University, OHSU Hospital and Clinics and Doernbecher Children's Hospital Bylaws of the Medical Staff Manual (site update Dec. 10, 1999) <http://www.ohsu.edu/hosp-policy/bylaws/bylawsindex.html> [hereinafter "OHSU Bylaws"].

n312. See *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1001-02 (N.D. Ga. 1992)* (stating bylaws cannot constitute contract because consideration lacking); *Zipper v. Health Midwest, 978 S.W.2d 398, 416 (Mo. Ct. App. 1998)* (concluding bylaws not contract without consideration).

n313. See infra note 315-21 and accompanying text for a discussion of the view that bylaws cannot constitute valid consideration.

n314. *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1001-02 (N.D. Ga. 1992).* See also *Tredrea v. Anesthesia & Analgesia, P.C., 584 N. W.2d 276, 287 (Iowa 1998)* (refusing to treat by laws as contracts); *Zipper v. Health Midwest, 978 S. W.2d 398, 416 (Mo. Ct. App. 1998)* (holding bylaws not contract because doctors did not give consideration).

n315. *557 A.2d 1249 (Conn. 1989).*

n316. *Gianetti, 557 A.2d at 1253.*

n317. Id.

n318. Id.

n319. See *id. at 1253 n.8* (explaining importance of regulatory commission); JCAHO Manual, supra note 1, MS.2 to MS.2.8 at MS-3 to MS-4 (defining guidelines for adopting bylaws).

n320. See *42 C.F.R. 482.22(c)* (1999) (outlining required content of bylaws and mechanism for adoption).

n321. See *Zipper v. Health Midwest, 978 S.W.2d 398, 416 (Mo. Ct. App. 1998)* (finding consideration lacking where hospital had preexisting legal duty to adopt bylaws). See also *Restatement (Second) of Contracts 73* (1981) ("Performance of a legal duty owed.., is not consideration....").

n322. See infra Part III.D for a discussion of relevant state statutes.

n323. *Restatement (Second) of Contracts* 73 cmt. a, at 180 (1981).

n324. Id. 73.

n325. See *Bass v. Ambrosius, 520 N. W.2d 625, 628 n.8 (Wis. Ct. App. 1994)* (explaining that statute fails to specify any particular procedure).

n326. Adz. Admin. Code R9-10-214 (West, WESTLAW through Dec. 31, 1999). See also Conn. Agencies Regs. 19-13-D3(b)(c) (West, WESTLAW through June 27, 2000) (establishing that "governing board" will manage hospital, adopt bylaws, annually designate medical staff, select hospital administrator, and create "joint conference committees"); Conn. Agencies Regs. 19-13-D3(c) (West, WESTLAW through Aug. 10, 1999) (outlining structure of medical staff and requiring medical staff bylaws include procedures for administration of privileges awarded to medical staff members); I11. Admin. Code tit. 77, 250.310 (West, Westlaw through Aug. 25, 2000) (mandating medical staff organize according to "bylaws, rules and regulations approved by governing Board"); Kan. Admin. Regs. 28-34-6a(e) (West, WESTLAW through Jan. 1, 1999) (ordering medical staff to adopt bylaws, rules, and regulations to be approved by the governing board, which must delineate "the organizational structure of the medical staff," peer review procedures, and structure and purpose of standing committee). For federal Medicare and Medicaid participants, the requirements are identified in *42 C.F.R. 482.22(c)* (1998).

n327. State hospital licensing requirements are regulatory in nature and typically do not create private causes of action.

n328. See *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1188 (E.D. Cal. 1998)* (explaining additional duties, beyond those in bylaws, constitute consideration).

n329. See *Gianetti v. Norwalk Hosp., 557 A.2d 1249, 1254 (Conn. 1989)* (looking at physician's relationship with hospital after physician becomes member of staff and concluding contract exists); *Virmani v. Presbyterian Health Servs. Corp., 488 S.E.2d 284, 288 (N.C Ct. App. 1997)* (finding contract by comparing doctor's relationship with hospital before and after joining staff).

n330. See *Gianetti, 557 A.2d at 1254* (stating that after extending privileges, hospital has "done something it was not already bound to do"); *Virmani, 488 S.E.2d at 288* (holding bylaws integral part of contract).

n331. See *Gianetti, 557 A.2d at 1254* (stating that extension of privileges equates to additional consideration); *Virmani, 488 S.E.2d at 288* (finding mutual assent to include bylaws as part of contract).

n332. See *Gianetti, 557 A.2d at 1254* (finding no duty to extend privileges); *Virmani, 488 S.E.2d at 288* (stating offer to practice medicine by hospital exceeds statutory duty).

n333. See *VirmanL 488 S.E.2d at 288* (noting that "the hospital receives the benefit of providing care to the physician's patients").

n334. See *id. at 288* (holding that "valid and enforceable contract existed.., and.., the Bylaws were an integral part of that contract").

n335. See *Gianetti, 557 A.2d at 1254-55* (finding consideration in privilege to practice medicine in hospital). See also *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 239-40 & n.25 (Conn. 1994)* (recognizing Gianetti's holding that extension of medical staff privileges in return for agreement to abide by bylaws constituted valid consideration); *VirmanL 488 S.E.2d at 287-88* (finding contract exists where parties agree to staff privileges). In *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989 (N.D. Ga. 1992), the* Northern District of Georgia acknowledged but rejected this possible basis for consideration by stating: "This mutually beneficial relationship, however, goes to the arrangement between the two parties, not to whether the bylaws, per se, are a contract as Plaintiff claims. Whether the bylaws per se constitute a contract is a wholly different question." *Robles, 785 F. Supp. at 1001 n.lO.* The rationale behind this statement is obscure. Perhaps, the court merely echoes Gianetti where the court held that bylaws alone did not constitute a contract. See *Gianetti, 557 A.2d at 1254.* But Gianetti, which Robles relied upon, agreed that in the context of the totality of the hospital/physician relationship the bylaws were enforceable as part of the whole contractual relationship, a conclusion Robles does not consider. See *id. at 1255.*

n336. John Hulston, et al., supra note 290.

n337. Id. at 354.

n338. The mutuality of obligation concept requires "that both parties to a contract must be bound or neither is bound." 2 Perillo & Bender, supra note 307, 6.1, at 197; accord, e.g., *Commercial Movie Rental Inc. v. Larry Eagle, Inc., 738 F. Supp. 227, 229-30 (W.D. Mich. 1989)* (explaining need for mutuality of obligation in contracts); *Bernstein, Bernstein, Wile & Gordon v. Ross, 177 N. W.2d 193, 195 (Mich. Ct. App. 1970)* (lack of mutuality invalidates contract).

n339. See e.g., *Commercial Movie Rental, 738 F. Supp. at 230* ("Where contract obligates only one party, while exempting the other party from any obligation to do so, it lacks mutuality and is valid for want of consideration."); *Munoz v. Flower Hosp., 507 N.E.2d 360, 365 (Ohio Ct. App. 1985)* (finding bylaws not contract because "no mutuality of obligation"); *Manczur v. Southside Hosp., 183 N.Y.S. 2d 960, 962 (N. Y. Sup. Ct. 1959)* (finding "no mutuality of obligation or consideration"). See also *Zipper v. Health Midwest, 978 S.W.2d 398, 416 (Mo. Ct. App. 1998)* (noting mutuality of obligation requirement).

n340. *Restatement (Second) of Contracts 79 &* cmt. f (1981); accord *Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1200 (Pa. Super Ct. 1987)* (stating that "mutuality of obligation is a thoroughly discredited notion"); 2 Perillo & Bender, supra note 307, 6. i, at 197 (explaining that "the so-called requirement of mutuality of obligation is now widely discredited"). But see Val D. Ricks, In Defense of Mutuality of Obligation: Why "Both Should Be Bound, or Neither," *78 Neb. L. Rev. 491, 547 (1999)* (defending mutuality of obligation doctrine).

n341. See *Restatement (Second) of Contracts 77* cmt. a (1981). See also id. 2 cmt. e (explaining illusory promises).

n342. See 1 Perillo, supra note 305, 1.17 at 49 (stating performance of illusory promise equates to consideration).

n343.2 Perillo & Bender, supra note 307, 6.2, at 219-20. See also *Weiner v. McGraw-Hill, Inc., 443 N.E.2d441, 444 (N. Y. 1982)* (holding enforceable termination procedures in handbook and mutuality of obligation not required); *Small v. Springs Indus., Inc., 357 S.E.2d 452, 455 (S.C. 1987)* (stating jury could decide whether employer was contractually bound by discharge process in handbook and bulletin even in absence of mutuality).

n344. See *Terre Haute Reg'l Hosp., Inc. v. El-Issa, 470 N.E.2d 1371, 1377 (Ind. Ct. App. 1984)* (stating "the doctrine of mutuality of obligation does not require that every duty within an agreement be based upon a corresponding obligation").

n345. See, e.g., *Webman v. Little Co. of Mary Hosp., 46 Cal. Rptr. 2d 90, 96 (Cal. Ct. App. 1995)* (stating that applicants, by signing application, agree to abide by bylaws); *Gianetti v. Norwalk Hosp., 557A.2d 1249, 1250 (Conn. 1989)* (stating physician agreed in writing to abide by bylaws); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 760 (Neb. Ct. App. 1996)* (stating bylaws require all applicants agree to be bound by them); *Virmani v. Presbyterian Health Servs. Corp., 488 S.E.2d 284, 288 (N.C. Ct. App. 1997)* (stating that under bylaws provision, physician agreed to be bound by them); *Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, 1076 (Utah 1991)* (finding "hospitals generally will not grant a doctor privileges at the hospital until the doctor agrees to abide by the bylaws of the hospital."); *Bass v. Ambrosius, 520 N. W.2d 625, 628 (Wis. Ct. App. 1994)* (observing that physician must agree to bylaws in signed application). See also Sullivan v Baptist Mem'l Hosp. - *Golden Triangle, Inc., 722 So. 2d 675, 677 (Miss. 1998)* (stating that in reappointment application physicians agreed to be bound by bylaws). JCAH's Guidelines for the Formulation of Medical Staff Bylaws 1971 includes a bylaws provision requiring that "every application for staff appointment shall be signed by the applicant and shall contain the applicant's specific acknowledgment of every medical staff member's obligations.., to abide by the medical staff bylaws, rules and regulations...." JCAH Guidelines for Bylaws, supra note 92, at 8. The guidelines also provided for a provision stating that:

The application form shall include a statement that the applicant has received and read the bylaws of the hospital governing body and the bylaws, rules and regulations of the medical staff and that he agrees to be bound by the terms thereof if he is granted membership and/or clinical privileges and to be bound by the terms thereof without regard to whether or not he is granted membership and/or clinical privileges in all matters relating to consideration of his application.

Id. at 12 (non-departmental hospitals); accord, e.g., HCWP Model Bylaws, supra note 92, at 4.4-9(c)(1); UTMB Bylaws, supra note 92, at 2.3.1. State law may also require medical staff members to agree to be bound by the bylaws. See, e.g., Mo. Stat. Ann. 205.195(1), 206.105(1) (1996) (requiring every physician, podiatrist, and dentist applying for staff membership to "give specifically" his or her "willingness to abide by the bylaws of the board and the staff in all respects.... ").

n346. JCAH Guidelines for Bylaws, supra note 92, at 8.

n347. Id. at 12; accord HCWP Model Bylaws, supra note 92, at 4.4-9(c)(1); UTMB Bylaws, supra note 92, at 2.3.1.

n348. See *Restatement (Second) of Contracts 71* (1981) (discussing requirement of consideration as bargained for performance or return promise).

n349. See JCAH Guidelines for Bylaws, supra note 92, at 11 (discussing importance of immunity from liability).

n350. See id. at 8, 47 (mandating attendance of staff meetings).

n351. See id. at 11 (authorizing background checks).

n352. See id. at 22 (requiring compliance with hearing or review procedures).

n353. See id. at 28 (failing to raise issues at original hearing equates to a wavier).

n354. See JCAH Guidelines for Bylaws, supra note 92, at 11 (explaining applicant's burden).

n355. See id. at 15 (explaining applicant must evidence his qualifications).

n356. Id. at 7.

n357. See, e.g., *Terre Haute Reg'l Hosp., Inc. v. El-Issa, 470 N.E.2d 1371, 1377 (Ind. Ct. App. 1984)* (noting physician's requirement to "participate in the operation of the Medical and Dental Staff" by, inter alia, participating in quality assurance programs).

n358. See also id. (stating bylaws required physician to attend various meetings, serve on committee and in staff positions, participate in quality assurance programs, participate in on-call program); *East Tex. Med. Ctr. Cancer Inst. v. Anderson, 991 S. W.2d 55, 62-63 (Tex. Ct. App. 1998)* (noting physician's consideration and duties under bylaws). For examples of bylaws, see Presbyterian Hosp. Bylaws, supra note 92; Yale-New Haven Hosp. Bylaws, supra note 92; HCWP Model Bylaws, supra note 92; UTMB Bylaws, supra note 92; OHSU Bylaws, supra note 311.

n359. JCAH Guidelines for Bylaws, supra note 92, at 12. See also JCAHO Manual, supra note 1, at MS-32 ("applicant... is informed of existing bylaws, rules and regulations, and policies regarding the application process and agrees, in writing, that he or she will be bound by them").

n360. See supra Part III.B.4.a for additional discussion of the reasoning of courts that have refused to recognize bylaws as contracts.

n361. See *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1002 (N.D. Ga. 1992)* (reasoning plaintiff had no input into or power to change bylaws); *Gianetti v. Norwalk Hosp., 557 A.2d 1249, 1254 (Conn. 1989)* (finding plaintiff made no claim he had input into bylaws); *Zipper v. Health Midwest, 978 S. W.2d 398, 416 (Mo. Ct. App. 1998)* (stating no bargained for exchange because doctor did not have input or power to change bylaws).

n362. *Restatement (Second) of Contracts 71(1)* (1981).

n363. In the area of insurance for example, insurance policies are considered to be contracts notwithstanding the lack of bargaining power or negotiation over specific terms in the policy. See *Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 264 (Del. 1995)* (agreeing with jurisdictions that insurance disputes are subject to constructual analysis); Collier v. MD - *Individual Practice Ass'n, 607A.2d 537, 539 (Md. 1992)* (stating in Maryland, insurance policies are construed like contracts); *Dairyland Ins. Co. v. Douthat, 449 S.E.2d 799, 801 (Va. 1994)* (observing that insurance policies are contracts to be construed under general contract principles).

n364. *Restatement (Second) of Contracts 71* cmt. b (1981).

n365. See JCAHO Manual, supra note 1, MS.2, at MS.3 ("Each medical staff develops and adopts bylaws and rules and regulations to establish a framework for self-governance of medical staff activities and accountability to the governing body."); MacEachern, supra note 8, at 165 (stating bylaws compiled by committee, then adopted by

whole staff). See also, e.g., *Mo. Ann. Stat. 205.195 (2)*, 206.105 (2) (West 1996) (providing for professional staff to initiate and adopt bylaws and rules); Ariz. Admin. Code R9-10-214 (D) (West, WESTLAW through Aug. 31, 1999) (stating that medical staff shall adopt bylaws); Kan. Admin. Regs. 28-34-6a(b) (West, WESTLAW through Jan. 1, 1999) (same).

n366. For examples of statutes requiring bylaws to be adopting by a governing body, see, Fla. Admin. Code Ann. r. 59A-3.220(1) (West, WESTLAW through Aug. 1, 2000) (stating that medical staff bylaws must be "approved by the governing body"); I11. Admin. Code tit. 77, 250.310(a) (West, WESTLAW through Aug. 25, 2000) (requiring governing body approve medical staff bylaws). See also *42 C.F.R. 482.22(c)(1)* (1999); JCAHO Manual, supra note 1, MS.2.1, at MS-3.

n367. See JCAHO Manual, supra note 1, M.S.2.1, at MS-3 for requirements necessary to adopt bylaws, rules, and regulations.

n368. *245 N.W.2d 472 (S.D. 1976).*

n369. *St. John's, 245 N.W.2d at 473.*

n370. Id.

n371. Id.

n372. Id.

n373. *Id. at473-74.*

n374. *St. John's, 245 N.W.2d at 474.*

n375. *Id. at 475.*

n376. See, e.g., Groseclose, supra note 92, at 27-28 ("The authority to adopt bylaws, like the authority for a corporation to come into existence, is statutory. Typically, that authority is unilaterally vested in the governing board. Hence the terms of the contract will be what one party says they are.").

n377. See *St. Mary's Hosp., Inc. v. Radiology Profl Corp., 421 S.E.2d 731, 736 (Ga. Ct. App. 1992)* (holding "hospitals are entitled to change the staff bylaws").

n378. See *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1000, 1002 & n.9 (N.D. Ga. 1992)* (calling bylaws "hospital bylaws," but citing cases involving medical staff bylaws).

n379. See *Gianetti v. Norwalk Hosp., 557 A.2d 1249, 1252-53 (Conn. 1989)* (reciting hospital's argument). See also *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1185 (E.D. Cal. 1998)* (citing Gianetti).

n380. See *Zipper v. Health Midwest, 978 S. W.2d 398, 416-17 (Mo. Ct. App. 1998)* (finding that hospital "had the right to unilaterally change the procedures set forth in the bylaws without consultation with anyone on the medical staff and to impose those bylaws on its medical staff"). The court cited no bylaw provisions supporting this conclusion. Possibly, the court referred to the hospital's own corporate bylaws rather than the medical staff bylaws. However, the court cited and relied on cases involving medical staff bylaws. See *id. at 416* (citing *Gianetti, 557 A.2d at 1256; Balkissoon v. Capitol Hill Hosp., 558 A.2d 304 (D.C. Cir. 1989); Todd v. Physicians & Surgeons Cmty. Hosp., Inc., 302 S.E.2d 378 (Ga. Ct. App. 1983))*. If the court is referring to the medical staff bylaws, its statement is highly suspect in view of Missouri law requiring that "the professional staff of the hospital.., shall initiate and, with the approval of the board, adopt bylaws," *Mo. Ann. Star. 205.195(2),* 206.105(2) (1996),

and JCAHO standards requiring the medical staff itself to adopt both the bylaws and any amendments to them. JCAHO Manual, supra note 1, M.S.2, M.S.2.1, at MS-3.

n381. See *Virmani v. Presbyterian Health Servs. Corp., 488 S.E.2d 284, 288 n.5 (N.C. Ct. App. 1997)* (noting that bylaws were not unilateral because staff was involved in formulating and recommending them).

n382. See 4 Williston & Lord, supra note 307, 8:4, at 41 (stating that under promissory estoppel, courts in effect form contract despite absence of consideration).

n383. See *Simpson Consulting, Inc. v. Barclays Bank PLC., 490 S.E.2d 184, 193 (Ga. Ct. App. 1997)* ("Promissory estoppel may apply to an executory promise without any other consideration, because detrimental reliance supplies consideration as a matter of waiver and estoppel.").

n384. See *D'Ulisse-Cupo v. Bd. of Dirs., 520 A.2d 217, 221 (Conn. 1987)* (recognizing contractual liability where action induced by reliance on promise); *Moukarzel v. Oxygen Elecs., LLC, No. CV990359965S, 1999 WL 643370, at 3* (Conn. Super. Ct. Aug. 12, 1999) (citing D'Ulisse-Cupo and characterizing reliance as consideration "substitute").

n385. See *Restatement (Second) of Contracts 90* at 242 (1981) (listing elements of promissory estoppel); 4 Williston & Lord, supra note 307, 8:5 (discussing elements of promissory estoppel). See also, e.g., *United of Omaha v. Hieber, 698 N.E.2d 869, 876 (Ind. Ct. App. 1998)* (applying five elements of promissory estoppel to facts of case), modified, *701 N.E.2d 622 (Ind. Ct. App. 1998); Ardtv. Titan Ins. Co., 593 N.W.2d 215, 219 (Mich. Ct. App. 1999)(listing* elements of promissory estoppel); *Allied Vista, Inc. v. Holt, 987 S. W.2d 138, 141 (Tex. Ct. App. 1999)* (stating elements of promissory estoppel); *Bouwens v. Centrilift, 974 P.2d 941, 947 (Wyo. 1999)*

(finding no promissory estoppel because first statement of "promise" was missing).

n386. See JCAH, Guidelines for Bylaws, supra note 92, at 21-30 for an outline of hearing and appellate review procedures and JCAHO Manual, supra note 1, MS.2.3.2, at MS-3, MS.5.2, at MS-7 for a discussion of fair hearing and appellate review. For examples of cases discussing these provisions in bylaws, see *Miller v. Nat'l Med. Hosp., Inc., 177 Cal. Rptr. 119, 128-31 (Cal. Ct. App. 1981)* (providing, as attachment, section of bylaws dealing with appellate procedures); *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 235-37, 242 nn.4, 6-7, 9-12, 15, 17 & 29 (Conn. 1994)* (discussing hospital procedures requiring second opinions and psychiatric consultations and bylaws dealing with notice); *Campbell v. St. Mary's Hosp., 252 N. W.2d 581, 588-90 (Minn. 1977)* (listing hearing and review procedures in bylaws); *Munoz v. Flower Hosp., 507 N.E.2d 360, 362 n.1 (Ohio Ct. App. 1985)* (listing appointment procedures); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 962-63, 968-69, 973 nn.6, 8-9, 18, 20, 28 (Utah 1998)* (discussing probation terms, review procedures and standards).

n387. See supra at notes 344-59 for a discussion of the specific promises in the staff bylaws.

n388. JCAH Guidelines for Bylaw, supra note 92, at 21.

n389. *Bulman v. Safeway, Inc., 978 P.2d 568, 573 (Wash. Ct. App. 1999).*

n390. See supra notes 89-112 and accompanying text for a discussion of the negative effect of the loss of privileges.

n391. See *Holt v. Good Samaritan Hosp. & Health Ctr., 590 N.E.2d 1318, 1322 (Ohio Ct. App. 1990)* (finding record did not indicate intent by either party to be bound by bylaws); *Munoz v. Flower Hosp., 507 N.E.2d 360, 365 (Ohio Ct. App. 1985)* (finding hospital not bound by bylaws and bylaws binding only if intent to be bound). See also *Tredrea v. Anesthesia & Analgesia, P.C., 584 N. W.2d 276, 285 (Iowa 1998)* (focusing on whether bylaws indicate intent to be bound); cf. *Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113, 115 & n.1 (Ohio 1989)* (questioning whether hospital's board or parent corporation is bound by medical staff bylaws).

n392. See supra notes 344-45 and accompanying text for a discussion of requirement that physician agrees to be bound by bylaws.

n393. *704 N.E.2d 698 (Ill. App. Ct. 1998)*, affd in pt., rev'd in pt. on other grounds, *Nos. 86952, 87120, 2000 WL 1599464, at 1* (Ill. Oct. 26, 2000).

n394. *Garibaldi, 704 N.E.2d at 704.*

n395. Id. (quoting *Garibaldi v. Applebaum, 653 N.E.2d 42 (Ill. App. Ct. 1995)).*

n396. Id. at 705.

n397. Id. The Illinois Supreme Court reversed Garibaldi in part but expressly did not decide the question of whether the hospital's bylaws were a contract. *Garibaldi v. Applebaum, Nos. 86952, 87120, 2000 WL 1599464, at 4* (I11. Oct. 26, *2000).*

n398. *Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113, 115 (Ohio 1989);* accord *Terre Haute Reg 'l Hosp., Inc. v. El-Issa, 470 N.E.2d 1371, 1377 (Ind. Ct. App. 1984)* (quoting medical staff bylaws).

n399. *Bass v. Ambrosius, 520 N.W.2d 625, 628 (Wis. Ct. App. 1994).*

n400. JCAHO Manual, supra note 1, at MS-2 to MS-3 (emphasis added).

n401. Id. at MS.2.2, at MS-3.

n402. See *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1188-89 (E.D. Cal. 1998)* (comparing assurances in bylaws with employer rules and policies and citing employee handbook cases); *Tredrea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 285 (Iowa 1998)* (citing "analogous cases involving employee handbooks" in deciding whether bylaws were a contract); *Bass, 520 N. W.2d at 627* (comparing bylaws with employee handbook); Hulston, et al., supra note 290, at 354.

n403. See infra notes 408-16 and accompanying text for a discussion of courts that have found contract rights in employee manuals.

n404. See 2 Mark A. Rothstein, et al., Employment Law 9.3, at 239 (1994) (noting that some courts held that statements made in employment handbooks did not create contractual obligations because of lack of consideration).

n405. See id. at 526 (concluding that approximately three-quarters of the states hold promises in manuals binding).

n406. See id. (stating "courts have addressed the consideration and mutuality of obligation obstacles either by viewing employment manuals as unilateral contracts or by applying the doctrine of promissory estoppel").

n407. *Duldulao v. St. Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (Ill. 1987).*

n408. For example, according to the JCAH Guidelines for Bylaws, supra note 92, the bylaws state that recommendations for reappointment "shall be based upon" a number of listed factors, id. at 14; redetermination of clinical privileges "shall be based upon" a number of listed factors, id. at 15; a physician facing adverse action "shall be entitled to a hearing" and potentially an appellate review, id. at 21; and "all hearings and appellate reviews shall be in accordance with the procedural safeguards set forth in this Article VIII to assure that the affected practitioner is accorded all rights to which he is entitled," id. at 21.

n409. See JCAHO Manual, supra note 1, MS.5.1.1, at MS-7 (stating that applicant "is oriented" to bylaws and agrees to be bound by them); id. MS.2.4.2, at MS-4 (requiring that if significant changes are made to bylaws, individuals are provided with revised text); id. at MS-32 (stating that applicant for appointment or reappointment "is informed of existing bylaws"). See also, *Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1221 (Alaska 1992)* (noting physician received bylaws as part of application); *Virmani v. Presbyterian Health Servs. Corp., 488 S.E.2d 284, 286 (N. C. Ct. App. 1997)* (noting plaintiff received copy of bylaws upon his application for privileges).

n410. See supra notes 344-45 and accompanying text for a discussion of the requirement that physician agree to be bound by bylaws.

n411. *685 P.2d 1081 (Wash. 1984).*

n412. *Thompson, 685 P.2d at 1088.*

n413. Some courts have found enforcement of bylaws more compelling than enforcement of employee handbooks. *See Garibaldi v. Applebaum, 704 N.E.2d 698, 704-05 (Ill. App. Ct. 1998)* (holding disclaimers effective in handbook but not effective in bylaws), affd in pt., rev'd in

pt. on other grounds, *Nos. 86952, 87120, 2000 WL 1599464* (I11. Oct. 26, 2000); *Virmani, 488 S.E.2d at 288 n.5* (stating that bylaws do not share handbook's unilateral nature).

n414. See *Gonzalez v. San Jacinto Methodist Hosp., 880 S. W.2d 436, 438-39 (Tex. Ct. App. 1994)(distinguishing* hospital bylaws from medical staff bylaws and finding procedural rights under hospital bylaws contractual). See also *Natale v. Sisters of Mercy, 52 N. W.2d 701, 709 (Iowa 1952)* (holding governing board not bound by provisions of medical staff bylaws); *Weary v. Baylor Univ. Hosp., 360 S. W.2d 895, 897 (Tex. Civ. App. 1962)* (stating that medical staff bylaws did not limit power of board); cf. *Tredrea v. Anesthesia & Analgesia, P.C., 584 N. W.2d 276, 284-87 (Iowa 1998)* (distinguishing hospital's bylaws from medical staff bylaws); *Ishak v. Fallston Gen. Hosp. & Nursing Ctr., 438 A.2d 1369, 1372 (Md. Ct. Spec. App. 1982)* (noting argument that only hospital bylaws are relevant, not medical staff bylaws). But see *Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805 S. W.2d 756, 759 (Tenn. 1991)* (rejecting the distinction between hospital and medical staff bylaws).

n415. See *Hongsathavij v. Queen of Angels~Hollywood Presbyterian Med. Ctr., 73 CaL Rptr. 2d 695, 699 n.2 (Cal. Ct. App. 1998)* (noting hospital's medical staff is separate legal entity, an unincorporated association); *Corleto v. Shore Mem'l Hosp., 350 A.2d 534, 539 (N.J. Super. Ct. 1975)* (concluding medical staff is unincorporated association capable of being sued); *Manczur v. Southside Hosp., 183 N.Y.S. 2d 960, 961-62 (N. Y. Sup. Ct. 1959)* (holding medical staff is unincorporated association); *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., 245 N. W.2d 472, 474 (S.D. 1976)* (finding medical staff is unincorporated association with standing to bring declaratory judgment action). See also Isele, supra note 68 (medical staff is separate legal entity, usually an unincorporated association).

n416. See *Manczur, 183 N. Y.S. 2d at 961-62* (finding medical staff bylaws not binding on hospital board).

n417. See JCAHO Manual, supra note 1, GO.2.2.1, at GO-4 ("The medical staff has the right to representation (through attendance an voice) by one or more medical staff members selected by the medical staff, at governing body meeting."). See also supra notes 27-31,236-41 and accompanying text for an analysis of legal requirements mandating creation of an organized medical staff.

n418. See also supra notes 27-31 and accompanying text for an analysis of legal requirements mandating creation of an organized medical staff.

n419. See JCAHO Manual, supra note 1, MS. 1, at MS-2 (medical staff accountable to hospital's governing body for quality of services provided by those with clinical privileges); MacEachern, supra note 8, at 143.

n420. According to one authority: "Although few governing bodies use this power to impose bylaws on medical staffs, the hospital administration nevertheless tends to have significant power to influence the form of the bylaws that will be adopted by the medical staff." Glen A. Reed & Robert W. Miller, The Hospital Medical Staff: Due Care with Due Process, in Representing Health Care Facilities 25, 37 (Matthew M. Strickler & Frederic L. Ballard, Jr. eds., 1981). Some courts hold that upon approval or ratification by the hospital board the medical staff bylaws become binding upon the hospital. See *Hager v. Venice Hosp., Inc., 944 F. Supp. 1530, 1534 (M.D. Fla. 1996)* (stating hospital bylaws, when approved and adopted by governing board, became binding and enforceable contract between hospital and physicians comprising medical staff), affd, *132 F.3d 1461 (11th Cir. 1997); Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986)* (same);

Joseph v. Passaic Hosp. Ass'n, 141 A.2d 18, 23 (N.J. 1958) (same). In *Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361 (N.D. Iowa 1992), the* hospital argued that although the hospital's board of directors might be bound under the bylaws, the hospital was not. *Id. at 1371.* The court rejected that argument, finding no distinction between the hospital and its board, *Id. at 1371.* Cf. *Munoz v. Flower Hosp., 507 N.E.2d 360, 364 n.2 (Ohio Ct. App. 1985)* (concluding hospital acts through and is represented by its board).

n421. See 1 Glen A. Reed, et al., Treatise on Health Care Law 1.0315] (Michael G. MacDonald, et al., eds., 1999).

n422. JCAHO Manual, supra note 1, MS-3 (emphasis added).

n423. See *Gonzalez v. San Jacinto Methodist Hosp., 880 S. W.2d 436, 438-39 & nn.2-3 (Tex. Ct. App. 1994)* (stating hospital bylaws set forth specific rights and duties for each physician). See also JCAHO Manual, supra note 1, M.S.2.4.1, at MS-4 (stating medical staff bylaws and governing body's bylaws must not conflict). Some courts hold that upon approval or ratification by the hospital board the medical staff bylaws become binding upon the hospital. See, e.g., *Joseph v. Passaic Hosp. Ass'n, 141 A.2d 18, 23 (N.J. 1958)* (noting that, upon ratification by board of governors of hospital, bylaws "became a constituent part of the Association's elemental law").

n424. In a closely related context, the courts are split on the question of whether a hospital can conspire with its medical staff under federal antitrust laws. Some hold that the medical staff in conducting peer review acts as the hospital's agent and therefore cannot conspire with the hospital. See, e.g., *Okusami v. Psychiatric Inst., 959 F.2d 1062, 1065 (D.C. Cir. 1992)* (finding no basis for proposition that hospital and its medical staff have divergent interests); *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 705 (4th Cir. 1991)*

(en banc) (stating that hospital and its staff should not be seen as possible co-conspirators); *Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 613 (6th Cir. 1990)* (finding that, in general, the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff), modified on rehearing, *927 F.2d 904 (6th Cir. 1991); Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 118 (3d Cir. 1988)* (concluding hospital could not conspire with executive committee). Under this view, the medical staff is "a natural component of the hospital's management structure." *Oksanen, 945 F.2d at 703.* Other courts, however, hold that the hospital and medical staff are separate entities capable of conspiracy. See *Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 819 (11th Cir. 1990)* (finding hospital and its medical staff unanalogous to corporate structure and therefore capable of conspiracy with each other); *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988)* (finding interests between hospital and its anesthesiologists "not as wed" as ties between corporation and its officers or employees).

n425. See, e.g., *Janda v. Madera Crnty. Hosp., 16 F. Supp. 2d 1181, 1184 (E.D. Cal. 1998)* (referring to medical staff bylaws as "hospital bylaws"); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 759-60 (Neb. Ct. App. 1996)* (noting physicians applying for staff privileges must agree to be bound by "hospital bylaws"); *Lewisburg Cmty. Hosp., Inc. v. Alfredson, 805 S. W.2d 756, 759 (Tenn. 1991)* (referring to bylaws collectively as "hospital and staff bylaws"); *Bass v. Ambrosius, 520 N. W.2d 625, 627-28 & nn.6-7 (Wis. Ct. App. 994)* (making no distinction between hospital and medical staff bylaws).

n426. This in no way implies that all the procedures and provisions of the bylaws will apply to applicants. By their terms, most of the provisions will apply only to staff members and not to applicants.

n427. See supra notes 288-413 and accompanying text for an analysis of the contract issue.

n428. Id.

n429. Id.

n430. See *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1002 (N.D. Ga. 1992)* (stating while bylaws do not constitute contracts, courts can enjoin hospitals to follow bylaws). See also Hulston, et al., supra note 290, at 355 (arguing bylaws should not be considered contract giving rise to cause of action for damages but should be enforceable in action for injunctive relief); cf. *Zipper v. Health Midwest, 978 S.W.2d 398, 417 (Mo. Ct. App. 1998)* (finding failure to state cause of action "because Dr. Zipper sought only contractual damages for MCI's alleged breach of [hospital] bylaws and contractual damages are not an available remedy for breach of [hospital] bylaws"). But see *Manczur v. Southside Hosp., 183 N. Y.S. 2d 960, 962 (N. Y. Sup. Ct. 1959)* (refusing to grant damages); *Weary v. Baylor Univ. Hosp., 360 S.W.2d 895, 896-97 (Tex. Civ. App. 1962)* (refusing injunction and damages).

n431. *785 F. Supp. 989 (N.D. Ga. 1992).*

n432. See *Robles, 785 F. Supp. at 1002* (reasoning that breach of contract action would run counter to policy of allowing hospitals to grant or withhold staff privileges).

n433. See id. (reasoning that state legislature required bylaws intending that hospitals would follow bylaws). See also *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 240 (Conn. 1994)* (stating judicial review for enforcement of bylaws may be based on legal duty imposed by state law); *St. Mary's Hosp., Inc. v. Radiology Profll Corp., 421 S.E.2d 731, 736 (Ga. Ct. App. 1992)* (holding staff bylaws alone confer no contractual rights but are enforceable in tort).

n434. See *42 U.S.C. lllll(a)* (1995) (limiting damages for professional review actions to knowing transmission of false information).

n435. See, e.g., *Ariz. Rev. Stat. 36-445.02(B)* (1993) (limiting relief to injunctions for erroneous decisions); *210 Ill. Comp. Star. Ann. 85/10.2* (Michie 1999) (granting immunity to hospital and peer review members); *Tenn. Code Ann. 63-6-219* (West Supp. 2000) (providing immunity to medical review committees); *Samaritan Health Sys. v. Superior Court, 981 P.2d 584, 589-90 (Ariz. Ct. App. 1998)* (finding hospital immune from damages for breach of contract claim based on failure to follow bylaws under Arizona statute); *Tabora v. Gottlieb Metn'l Hosp., 664 N.E.2d 267, 272 (Ill. App. Ct. 1996)* (stating that under statute hospital cannot be liable for monetary damages to physician as result of peer review); *Gureasko v. Bethesda Hosp., 689 N.E.2d 76, 80 (Ohio Ct. App. 1996)* (citing Ohio statute granting hospitals immunity from damages for their peer review actions); *Eyring v. Fort Sanders Parkwest Med. Ctr., Inc., 991 S.W.2d 230, 234-36, 239 (Tenn. 1999)* (analyzing Tennessee Peer Review Law of 1967 and finding hospital immune from breach of contract damage claim).

n436. See *Everett v. St. Ansgar Hosp., 974 F.2d 77, 80 (8th Cir. 1992)* (citing hospital's bylaws immunity clause). See also *Brader v. Allegheny Gen. Hosp., 167 F.3d 832, 834 (3d*

Cir. 1999) (affirming dismissal based on HCQIA immunity without reaching bylaws' immunity; district court held that hospital was immune under bylaws).

n437. 42 *U.S.C. 11111,* 11151(11) (1995). See also, *Brader, 167 F.3d at 834* (noting application of HCQIA depends upon hospital meeting Act's requirements); *Wayne v. Genesis Med. Ctr., 140 F.3d 1145, 1148 (8th Cir. 1998)* (rejecting cause of action where plaintiff failed to rebut presumption of hospital's compliance with HCQIA's immunity provision).

n438. See, e.g., *Brader, 167 F.3d at 839, 843* (granting summary judgment dismissing bylaws claims based upon HCQIA); *Wayne, 140 F.3d at 1147-49* (holding HCQCIA immunity barred contract claim based upon bylaws).

n439. See infra notes 496-503 and accompanying text for a discussion of immunity statutes and the good faith requirement.

n440. For a critical and cryptic view, see Groseclose, supra note 90, at 28 ("The so-called contract can actually be a vehicle for oppression rather than a meaningful judicial remedy.").

n441. 973 *P.2d 956 (Utah 1998).*

n442. *Brinton, 973 P.2d at 965.*

n443. Id. See also *Bryant v. Glen Oaks Med. Ctr., 650 N.E.2d 622, 631 (Ill. App. Ct. 1995)* (stating that any right to hearing was waived for failure to request hearing within 15 days of notice as required by bylaws); *Renforth v. Fayette Mem'l Hosp. Ass'n, 383 N.E.2d 368, 377 (Ind. Ct. App. 1978)* (holding failure to request hearing deemed waiver under bylaws); *Corines v. Catholic Med. Ctr., Inc., 540 N. Y.S.2d 273, 273-74 (N. Y. App. Div. 1989)* (finding that, under bylaws,

failure to appear at hearing without good cause was waiver of right to hearing or any further review); *East Texas Med. Ctr. Cancer Inst. v. Anderson, 991 S.W.2d 55, 64 (Tex. Ct. App. 1998)* (stating failure to request hearing within ten days was waiver).

n444. *Brinton, 973 P.2d at 966.*

n445.974 *F.2d 77 (8th Cir. 1992).*

n446. *Everett, 974 F2d at 80.*

n447. Id. (alterations in original) (quoting St. John's Bylaws, Art. 14). But see *Westlake Cmty. Hosp. v. Superior Court, 551 P.2d 410, 418-19 (Cal. 1976)* (holding bylaws' exculpatory clause unenforceable as against public policy).

n448. 192 *A.2d 817 (N.J. 1963).*

n449. *Greisman, 192 A.2d at 818.*

n450. *Id. at 819.*

n451. *Id. at 820.*

n452. *Id. at 821* (citations omitted).

n453. Id. (internal citation omitted).

n454. *Greisman, 192 A.2d at 821.*

n455. *Id. at 821-22.*

n456. *Id. at 822-23* (citing *Falcone v. Middlesex County Med. Soc'y, 170 A.2d 791 (N.J. 1961)).*

n457. *Id. at 825.*

n458. Id.

n459. *Sussman v. Overlook Hosp. Ass'n, 222 A.2d 530, 537-38 (N.J. Super. Ct. 1966),* aft'd, *231 A.2d 389 (N.J. Super. Ct. App. Div. 1967).* See also *Balkissoon v. Capitol Hill Hosp., 558 A.2d 304, 308 (D.C. Cir. 1989)* (requiring compliance with bylaws reduces risk of arbitrary decisions but "hospital cannot technically comply with [bylaws] while defeating the purpose inherent in the process they create").

n460. *Greisman v. Newcomb Hosp., 192 A.2d 817, 824 (N.J. 1963)* (stating "our proper concern here is whether the hospital had the right to exclude consideration of the plaintiff, solely because he was a doctor of osteopathy").

n461. See, e.g., *Sokol v. Akron Gen. Med. Ctr., 173 F.3d 1026, 1030 (6th Cir. 1999)* (applying Ohio law and stating "hospitals must provide "procedural due process.., in adopting and applying reasonable, non-discriminatory criteria for the privilege of practicing'"); *Bricker v. Sceva Speare Mem'l Hosp., 281 A.2d 589, 592 (N.H. 1971)* (recognizing rules will be reviewed by court and "set aside if arbitrary, capricious or unreasonable") (citations omitted); *Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113, 114 (Ohio 1989)* (finding decisions of hospital will be set aside if "arbitrary, capricious or unreasonable"); *Nashville Mem'l Hosp., Inc. v. Binkley, 534 S. W.2d 318, 320 (Tenn. 1976)* (stating "duly licensed physician.., cannot be deprived of [the right to practice] by rules, regulations, or actions of the hospital's governing authority that are unreasonable, capricious or discriminatory").

n462. *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 568 (Haw. 1972).*

n463. See *Storrs v. Lutheran Hosps. & Homes Soc'y, Inc., 609 P.2d 24, 28 (Alaska 1980)* (citing Greisman for proposition that hospital "cannot violate due process

standards in denying staff privileges"); *Peterson v. Tuscon Gen. Hosp., Inc., 559 P.2d 186, 189-91 (Ariz. Ct. App. 1976)* (providing lengthy explanation of Greisman holding and its progeny); *Ascherman v. San Francisco Med. Soc'y, 114 Cal. Rptr. 681, 693-97 (Cal. Ct. App. 1974)* (citing Greisman and reviewing holding in detail); *Hawkins v. Kinsie, 540 P.2d 345, 348-49 (Colo. Ct. App. 1975)* (citing Greisman and finding minority of jurisdictions have "concluded that courts should grant relief where the action of the private hospital has been demonstrated to be unreasonable, arbitrary, and capricious"); *Silver v. Castle Mem'l Hosp., 497 P.2d 564, 568 n.5 (Haw. 1972)* (citing Greisman and noting New Jersey as one jurisdiction that held admissions decisions are subject to judicial review); *Bricker v. Sceva Speare Mem'l Hosp., 281 A.2d 589, 592 (N.H. 1971)* (reviewing hospital's decision for due process and reasonable judgment made in good faith); *Berman v. Valley Hosp., 510 A.2d 673, 676 (N.J. 1986)* (citing Greisman and stating that court's review should determine if hospital's decision advances public health care interest); *Kelly v. St. Vincent Hosp., 692 P.2d 1350, 1352 (N.M. Ct. App. 1984)* (citing Greisman and explaining that powers "used in the selection of medical staff" are "fiduciary powers to be exercised reasonably and for the public good"); *Davidson v. Youngstown Hosp. Ass'n, 250 N.E.2d 892, 895 (Ohio Ct. App. 1969)* (agreeing with Greisman reasoning and noting private hospital not immune from public supervision because of its private nature); *Woodard v. Porter Hosp., Inc., 217 A.2d 37, 40 (Vt. 1966)* (citing Greisman and holding courts will intervene when hospital's decision is "unreasonable, arbitrary, capricious or discriminatory"); cf. *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 240 (Conn. 1994)* (citing Greisman and agreeing that hospital's powers held in trust); *Balkissoon v. Capital Hill Hosp., 558 A.2d 304, 308 (D. C. Cir. 1989)* (noting public's substantial interest and holding duty to comply with bylaws independent of contractual right); *Nashville Mem'l Hosp., Inc. v. Binkley, 534 S. W.2d 318, 320 (Tenn. 1976)* (citing Greisman).

States, however, have not uniformly embraced Greisman. See *Barrows v. Northwestern Mem'l Hosp., 525 N.E.2d 50, 52-55 (Ill. 1988)* (expressly rejecting Greisman as representing view of "tiny minority" of states and inconsistent with Illinois public policy); *Bello v. South Shore Hosp., 429 N.E.2d 1011, 1015 (Mass. 1981)* (rejecting Greisman); *Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 369-70 (Me. 1988)* (Hornby, J., concurring) (rejecting Greisman's common law cause of action); cf. *id. at 368-69* (discussing holding in Greisman but declining to adopt or reject it on facts of case).

n464. See, e.g., *Sokol, 173 F.3d at 1029* (concerning limitation of privileges); *Hawkins, 540 P.2d at 346* (involving termination of privileges); *Silver, 497 P.2d at 566* (involving failure to renew temporary privileges); *Bricker, 281 A.2d at 591* (concerning denial of reappointment).

n465. *Greisman, 192 A.2d at 824, 825.*

n466. *Silver, 497 P.2d at 570.*

n467. *Restatement (Second) of Torts 874* cmt. a. (1979); accord *Restatement (Second) of Trusts* 2 cmt. b (1959) (discussing circumstances constituting fiduciary relationship).

n468. Scott FitzGibbon, Fiduciary Relationships are Not Contracts, *82 Marq. L. Rev. 303, 306-07* (1998-99) (footnotes omitted).

n469. See Black's Law Dictionary 625 (6th ed. 1990) (defining fiduciary as: "A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking").

n470. See *Restatement (Second) of Torts 874* cmt. a. (1979) (finding fiduciary relationship imposes duty to act for benefit of another); accord *Restatement (Second) of Trusts* 2 cmt. b (1959) (stating "a person in a fiduciary relationship to another is under a duty to act for the benefit of the other").

n471. The fact that states have their own professional licensing requirements for physicians suggests that the public is acting independently to protect its own interests.

n472. A grocery store provides a vital service to the public but does not thereby become a fiduciary.

n473. Arguably, denial of the services of a qualified physician or denial of the opportunity to select a particular physician is some harm.

n474. Cf. *Restatement (Second) of Torts 874 &* cmt. b (finding fiduciary may be liable to beneficiary for breach).

n475. The California Court of Appeals in *Ascherman v. San Francisco Medical Society, 114 Cal. Rptr. 681, 693-97 (Cal. Ct. App. 1974),* quoted extensively from Greisman in holding a private hospital must grant a physician minimum due process when considering staff privileges. See *id. at 693-97* (quoting Greisman). See also *Blank v. Palo Alto-Stanford Hosp. Ctr., 44 Cal. Rptr. 572, 576 n.2 (Cal. Ct. App. 1965)* (citing Greisman). Greisman itself cited *Willis v. Santa Ana Community Hospital Ass'n, 376 P.2d 568 (Cal. 1962),* to suggest that private hospitals' decisions might not always be discretionary. See *Greisman v. Newcomb Hosp., 192 A.2d 817, 821 (N.J. 1963)* (citing Willis). Similarly, two California Supreme Court decisions involving membership in an orthodontists' society relied upon *Falcone v. Middlesex County Medical Society, 170 A.2d 791 (N.J. 1961),* a forerunner cited in Greisman, in finding review of membership decisions of private associations under a common law fair

procedure theory. See *Pinsker v. Pacific Coast Soc'y, 526 P.2d 253, 260 (Cal. 1974)* (citing Falcone); *Pinsker v. Pacific Coast Soc'y, 460 P.2d 495, 498 (Cal. 1969)* (citing Falcone). The second Pinsker opinion also relied on Sussman and Silver, and cited favorably Ascherman. See *Pinsker, 526 P.2d at 260 n.8, 263* (citing Sussman, Silver, and Ascherman). Again in *Antonv. San Antonio Community Hospital, 567 P.2d 1162 (Cal. 1977)* [Anton II], the California Supreme Court cited Ascherman and Silver to apply the common law fairness doctrine to decisions of private hospitals. See *id. at 1168 n.12* (citing Ascherman and Silver). For a good discussion of the development of California law, see Neil McNiece, Comment, The State of California Law in Hospital Peer Review Cases, *13 Sw. U. L. Rev. 337 (1982)*. See also *Oskooi v. Fountain Valley Reg'l Hosp. & Med. Ctr., 49 Cal. Rptr. 2d 769, 776-77 (Cal. Ct. App. 1996)* (Sills, P.J., concurring) (discussing development of California law).

n476. See e.g., *Miller v. Eisenhower Med. Ctr., 614 P.2d 258, 265, 269-70 (Cal. 1980)* (Mosk, J., dissenting) (allowing review of hospital credentialing procedures); *Antonv. San Antonio Cmty. Hosp., 567 P.2d 1162, 1168 (Cal. 1977)* [Anton II] (reviewing decision and requiring hearing, evidence, and discretion in determination of facts for fair procedure); *Pinsker, 526 P.2d at 263* (recognizing applicant's "judicially enforceable right" to have application considered according to fundamentals of due process); *Goodstein v. Cedars-Sinai Med. Ctr., 78 Cal. Rptr. 2d 577, 583 (Cal. Ct. App. 1998)* (stating "policy of nondisclosure comports with the concept of fair procedure"); *Gaenslen v. Bd. of Dirs., 232 Cal. Rptr. 239, 241-42 (Cal. Ct. App. 1985)* (reviewing hospital's decision under "fair procedure" concept); *Cipriotti v. Bd. of Dirs., 196 Cal. Rptr. 367, 373 (Cal. Ct. App. 1983)* (permitting review of hospital decision under "fair procedure" standard); *Antonv. San Antonio Cmty. Hosp., 183 Cal. Rptr. 423, 431-32 (Cal. Ct. App. 1982)* [Anton I] (noting hospital decision, as one of private agency, reviewable under "fair procedure" standard); *Ascherman v. St. Francis Mem'l Hosp., 119 Cal.*

Rptr. 507, 509 & n.4 (Cal. Ct. App. 1975) (reviewing hospital decision under "fair procedure" standard rather than "due process" standard); *Ascherman, 114 Cal. Rptr. at 693-97* (allowing review of hospital decision).

n477. *567 F.2d 1162 (Cal. 1977)* [Anton II].

n478. *Anton II, 567 P.2d at 1168.*

n479. See, e.g., *Gaenslen, 232 Cal. Rptr. at 241-42* (discussing distinction between due process and fair procedures); *Anton I, 183 Cal. Rptr. at 432 & n.4* (noting proper term for review is "fair procedure" because decision based on common law and not constitutional privileges). The distinction is one of origin and does not indicate the extent of protection provided. See *Goodstein, 78 Cal. Rptr. 2d at 583* (identifying "fairness" as essence of both rights); *Anton I, 183 Cal. Rptr. at 433* (finding "little distinction"); *Applebaum v. Bd. of Dirs., 163 Cal. Rptr. 831, 836 (Cal. Ct. App. 1980)* (identifying "fairness" as "essence of both rights").

n480. *Miller v. Nat'l Med. Hosp., Inc., 177 Cal. Rptr. 119, 124 (Cal. Ct. App. 1981).*

n481. *Miller v Eisenhower Med. Ctr., 614 P.2d 258, 265 (Cal. 1980)* (Mosk, J., dissenting); accord, e.g., *Goodstein, 78 Cal. Rptr. 2d at 582* (discussing whether hospital policy is ""substantially irrational, unlawful or contrary to established public policy or procedurally unfair"") (citation omitted).

n482. See *Miller, 614 P.2d at 271-72* (Mosk, J., dissenting) (discussing standards); *Anton II, 567 P.2d at 1168 & n.12* (discussing similarities in standards).

n483.*567 P.2d 1162 (Cal. 1977).*

n484. *Anton II, 567 P.2d at 1172.*

n485. *Cal. Civ. Pro. Code 1084-1097* (West 1990 & Supp. 2000).

n486. See *Cal. Civ. Pro. Code 1094.5(d)* (West Supp. 2000) (adopting "substantial evidence" standard). See also *Anton I, 183 Cal. Rptr. at 426-27* (citing Section 1094.5(d)).

n487. See *Westlake Cmty. Hosp. v. Superior Court, 551 P.2d 410, 411 (Cal. 1976)* (discussing mandamus requirement and finding successful mandamus action generally required before tort action for damages); *Bollengier v. Doctors Med. Cir., 272 Cal. Rptr. 273, 276-82 (Cal. Ct. App. 1990)* (noting that successful mandamus action required before damage suit can be brought); *Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 650-51 (9th Cir. 1988)* (citing Westlake).

n488. *Hongsathavij v. Queen of Angels~Hollywood Presbyterian Med. Ctr., 73 Cal. Rptr. 2d 695, 703 (Cal. Ct. App. 1998)* (quoting in part *Bonner v. Sisters of Providence Corp., 239 Cal. Rptr. 530, 535 (Cal. Ct. App. 1987));* accord *Oskooi v. Fountain Valley Reg 'l Hosp. &Med. Ctr., 49 Cal. Rptr. 2d 769, 773 (Cal. Ct. App. 1996)(discussing* substantial evidence standard); *Webman v. Little Co. of Mary Hosp., 46 Cal. Rptr. 2d 90, 97-98 (Cal. Ct. App. 1995)* (applying "substantial evidence in the light of the whole record" standard).

n489. See *Rosenblit v. Superior Court, 282 Cal. Rptr. 819, 823 (Cal. Ct. App. 1991)* (discussing independent review).

n490. In its current codification, section 1094.5(d) states:

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the

Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.

Cal. Civ. Pro. Code 1094.5(d) (West Supp. 1999).

n491. See *Westlake Cmty. Hosp. v. Superior Court, 551 P.2d 410, 411 (Cal. 1976)* (discussing exhaustion requirement). See also *Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 650-51 (9th Cir. 1988)* (citing Westlake in its discussion of exhaustion requirement); *Bollengier v. Doctors Med. Ctr., 272 Cal. Rptr. 273, 276-82 (Cal. Ct. App. 1990)* (noting successful mandamus action and exhaustion of hospital's administrative process required before damage suit can be brought).

n492. *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 755 (W. Va. 1991)* (emphasis added); accord *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 759 (Neb. Ct. App. 1996)* (quoting Mahmoodian); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 964 (Utah 1998)* (quoting Mahmoodian).

n493. See, e.g., *Mahmoodian, 404 S.E.2d at 755* (court will review to ensure bylaws afford notice and fair hearing procedures).

n494. *Id. at 756.*

n495. *Adkins v, Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 741 (Ill. 1989).*

n496. For examples of immunity statutes, *see Ariz. Rev. Stat. Ann. 36-445.02* (West 1993); *Colo. Rev. Stat. 12-36.5-105,* 12-36.5-203 (1999); *210111. Comp. Stat. Ann. 85/10.2* (West 1993); *Ind. Code Ann. 16-21-2-6(b)* (West 1997); *Ky. Rev. Stat. Ann. 311.377* (West 1997); *Mass. Gen. Laws Ann. ch. 111, 203(c)* (West Supp. 2000); and *Tenn. Code Ann. 63-6-219* (Michie 1999). For the federal immunity statute, see *42 U.S.C. 11111(a)* (1995).

n497. *Fla. Stat. Ann. 395.0193 (5)* (West Supp. 2000).

n498. See, e.g., *Ala. Code 6-5-333(a)* (Michie 1993) (applicable only to "dentists, chiropractors, or physicians"); *Cal. Civ. Code 43. 7(e)* (Deering Supp. 1999) (exempting hospitals); *Pa. Stat. Ann. tit. 63, 425.3(b)* (West 1996) (immunizing individuals only); *Axline v. St. John's Hosp. & Health Ctr., 74 Cal. Rptr. 2d385, 388 (Cal. Ct. App. 1998)* (stating California statute applicable to individuals - not hospitals); *Cooper v. Delaware Valley Med. Ctr., 654 A.2d 547, 552-53 (Pa. 1995)* (stating that although Pennsylvania statute subsection (a) applies to hospitals providing information, subsection (b) protects only individuals). But cf. *Eyring v. Fort Sanders Parkwest Med. Ctr., Inc., 991 S. W.2d 230, 234-36 (Tenn. 1999)* (finding ambiguous language of Peer Review Law granted immunity to hospitals).

n499. See *Ariz. Rev. Star. Ann. 36-445.02(B)* (West 1993) ("No hospital.., may be liable in damages to any person who is denied the privilege to practice in a hospital or center or whose privileges are suspended, limited or revoked.").

n500. See, e.g., *Colo. Rev. Stat. 12-36.5-105(2)* (1999) (immunizing hospitals where action in good faith); *Mass. Gen. Laws Ann. ch. 111, 203(c)* (West Supp. 2000) (same); *Wash. Rev. Code Ann. 4.24.250* (West 1988) (same).

n501. See, e.g., *Ga. Code Ann. 31-7-131(2)(K)*, 31-7-132(a) (West 1996) (adopting "without malice" standard). Other states that have adopted the "without malice" standard include Louisiana (La. *Rev. Star. Ann. 13:3715.3(C)* (West Supp. 2000)), Mississippi *(Miss. Code Ann. 73-25-93(2)* (West 1999)), and North Dakota *(N.D. Cent. Code 23-34-06(2)* (Supp. 1999)).

n502. *See D.C. Code Ann. 32-503* (Michie 1998) (adopting "reasonable belief" standard); *Fla. Stat. Ann. 395.0193 (5)* (West Supp. 2000) (adopting "without intentional fraud" standard); *Ind. Code Ann. 16-21-2-6 (b)* (West 1997) (adopting hybrid "in good faith and without malice" standard); *Utah Code Ann. 58-13-4 (2)(Michie* 1998) (adopting "in good faith and without malice" standard).

n503. See, e.g., *Samaritan Health Sys. v. Superior Court, 981 P.2d 584, 589 (Ariz. Ct. App. 1998)* (holding immunity statute barred breach of contract claim); *Noble v. Martin Mem'l Hosp. Ass'n, 710 So. 2d 567, 568-69 (Fla. Dist. Ct. App. 1997)* (holding hospital immune from monetary damages); *Tabora v. Gottlieb Mere'l Hosp., 664 N.E.2d 267, 272 (Ill. App. Ct. 1996)* (holding hospital immune); *Gureasko v. Bethesda Hosp., 689 N.E.2d 76, 80 (Ohio Ct. App. 1996)* (holding hospital qualified for immunity); *Eyring v. Fort Sanders Parkwest Med. Ctr., Inc., 991 S. W.2d 230, 234-36 (Tenn. 1999)* (holding qualified immunity available to hospital).

n504. See, e.g., *Colo. Rev. Star. Ann. 12-36.5-104(4, 7,* 8) (West 1999) (establishing peer review procedural rights); *D.C. Code Ann. 32-1307* (Michie 1998) (providing standards for privileges and staff membership; procedural rights); *Fla. Stat. Ann. 395.0191 (4)-(6),* 395.0193(3) (West Supp. 2000)

(establishing eligibility criteria and grounds for adverse action); *210 Ill. Comp. Stat. Ann. 85/10.4(b)* (West Supp. 2000) (outlining minimum procedures for applicants and action concerning existing privileges); *Ind. Code Ann. 16-21-2-5(3)* (West Supp. 2000) (listing standards for appointment and continued membership); *Md. Code Ann. Health-Gen. H 19-319(e)* (Supp. 1996) (establishing minimum standards for credentialing process); *Neb. Rev. Stat. Ann. 71-2048.01* (1997) (requiring establishment of reasonable standards and application procedures); *Tex. Health & Safety Code Ann. 241.101(c)* (West Supp. 2000) (requiring procedural due process for medical staff applicants); *Va. Code Ann. 32.1-134.1* (Michie 1997) (detailing appropriate grounds for exclusion or expulsion of physician).

n505. See, e.g., *Colo. Rev. Stat. Ann. 12-36.5-104(4, 7, 8)* (1999); *D.C. Code 32-1307* (Michie 1998); *210 Ill. Comp. Star. Ann. 85/10.4(b)* (West Supp. 2000).

n506. The Texas statute, for example, states:

(c) The process for considering applications for medical staff membership and privileges or the renewal, modification or revocation of medical staff membership and privileges must afford each physician, podiatrist, and dentist procedural due process.

(d) An applicant for medical staff membership or privileges may not be denied membership or privileges on any ground that is otherwise prohibited by law.

Tex. Health & Safety Code Ann. 241.101(c), (d) (West Supp. 2000).

n507. Compare *Brooks v. Arlington Hosp. Ass'n, 850 F.2d 191, 198 (4th Cir. 1988)* (stating under Virginia statute, physician entitled to written statement of reasons for

suspension and review if reasons stated not allowed by statute), and *Lake Hosp. & Clinic, Inc. v. Silversmith, 551 So. 2d 538, 544 (Fla. Dist. Ct. App. 1989)* (finding physician has statutory due process claim), with *Wong v. Garden Park Cmty. Hosp., Inc., 565 So. 2d 550, 552 (Miss. 1990)* ("The legislature has clearly limited judicial surveillance of hospital disciplinary proceedings to the narrow inquiry of whether the hospital complied with the procedural due process requirements prescribed by its own bylaws."), and *Medical Ctr. Hosps. v. Terzis, 367 S.E.2d 728, 729-30 (Va. 1988)* (stating review limited to consideration of factors listed in statute).

n508.205 *N.Y.S. 554 (N. Y. App. Div. 1924)*, affd, *147 N.E. 219 (N..Y. 1925)*. See also *Leider v. Beth Israel Hosp. Ass'n, 182 N.E.2d 393 (N. Y. 1962)* (finding the board of trustees may not be restricted in the exercise of the sweeping powers the constitution commits to them).

n509. *Guibor v. Manhattan Eye, Ear & Throat Hosp., Inc., 386 N.E.2d 247, 247 (N. Y. 1978)*. The rule also applied to the termination of privileges. See *Cohoes Mem'l Hosp. v. Department of Health, 399 N.E.2d 1132, 1134 (N. Y. 1979)* (discussing old rule).

n510. N.Y. Pub. Health 2801-b(1) (West Supp. 2000).

n511. See N.Y. Pub. Health 2801-c (West Supp. 2000) (providing injunctive relief). See also, e.g., *Johnson v. Nyack Hosp., 964 F.2d 116, 121 (2d Cir. 1992)* (discussing New York statute which requires complaint be filed with PHC public health counsel); *Rose v. Taddonio, 934 F. Supp. 593, 595 (S.D.N.Y. 1996)* (discussing New York statute which requires physician to exhaust all remedies through PHC even for injunctive relief); *Gelbard v. Genesee Hosp., 664 N.E.2d 1240, 1242 (N. Y. 1996)* (outlining two-step process set forth by legislature where physician may seek injunctive relieve); *Fritz v. Huntington Hosp., 348 N.E.2d 547, 553-54 (N. Y. 1976)*

(recognizing under CPLR 103(c) relief includes injunctive action); *Guibor, 386 N.E.2d at 248* (holding CPLR 103(c) allows injunctive action); *Wee v. City of Rome, 649 N. Y.S.2d 614, 615 (N. Y. App. Div. 1996)* (stating injunction "exclusive remedy"); *Wollman v. Long Island Jewish Med. Ctr., 566 N. Y.S.2d 937, 939 (N. Y. App. Div. 1991)* (stating injunctive relief available under Public Health Law Section 2801-b); *Jackaway v. Northern Dutchess Hosp., 526 N. Y.S.2d 599, 599 (N. Y. App. Div. 1988)* (explaining plaintiff sought injunctive relief).

n512. See *West Coast Hosp. Ass°n v. Hoare, 64 So. 2d 293, 299 (Fla. 1953)* (holding rules and regulations applied to public hospitals not applicable to private hospitals).

n513. *Fla. Stat. Ann. 395.0191,* 395.0193 (West Supp. 2000). See also *Lake Hosp. & Clinic, Inc. v. Silversmith, 551 So. 2d 538, 544 (Fla. Dist. Ct. App. 1989)* (recognizing that adoption of 395.065(2) made private hospitals accountable for regulation of staff privileges). The state also has promulgated corresponding regulations governing hospital staff membership decisions and peer review. See Fla. Admin. Code Ann. r. 59A-3.201 (West, WESTLAW through July 1, 2000) (defining terms used in various state administrative regulations concerning management of hospital, organizational structure of medical staff, and peer review procedures); id. at 3.220 (requiring hospitals to have organized medical staff and bylaws, as well as rules and regulations that govern selection and retention of medical staff).

n514. *Fla. Star. Ann. 395.0191 (4)-(6),* 395.0193 (2), (3) (West Supp. 2000). See also *Silversmith, 551 So. 2d at 544* (recognizing statute requires private hospitals to be accountable for staffing privileges); *Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986)* (purpose of statute was to create conformity

and fairness in private hospital staffing decisions); *Carida v. Holy Cross Hosp., Inc., 427 So. 2d 803, 805 (Fla. Dist. Ct. App. 1983)* (explaining statute eliminates private/public distinction with regard to staff privileges).

n515. See *Fernandez v. Coral Gables Hosp., Inc., 720 So. 2d 1161, 1162-63 (Fla. Dist. Ct. App. 1998)* (discussing statute allows for injunctive relief); *Silversmith, 551 So. 2d at 544* (stating statute, not constitutional due process, provides basis for physician's claim); *Lawler, 497 So. 2d at 1264-65* (incorporating statute and explaining hospitals immune from liability as long as decisions conform with statute and not malicious); *Dam v. Heart of Fla. Hosp., Inc., 536 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1989)* (statute provides procedure for terminating privileges); *Carida, 427 So. 2d at 806 & n.6* (interpreting statute and concluding inadequate notice of termination would violate statute); cf. *Noble v. Martin Mem'l Hosp. Ass'n., 710 So. 2d 567, 569 (Fla. Dist. Ct. App. 1997)* (dismissing damage claims based on failure to allege "intentional fraud" as required by statute).

n516. See *Ariz. Rev. Stat. Ann. 36-445.02(B)* (West 1993) (stating judicial review limited to record with injunction as only remedy); *Cal. Civ. Pro. Code 1094.5(a)*, (d), (h) (West Supp. 2000) (providing for judicial review); *Colo. Rev. Stat. 12-36.5-106 (10)* (1999) (declaring administrative action may be reviewed by a court of appeals); *D.C. Code 32-1309(c)* (Michie Supp. 2000) (stating aggrieved party may bring action in superior court); N.Y. Pub. Health 2801-c (West 1993) (providing injunction relief by the courts); *Va. Code Ann. 32.1-134.1* (Michie 1997) (outlining right to injunctive relief by court); cf. *Fla. Stat. Ann. 395.0191 (9)*, 395.0193 (9) (West Supp. 2000) (providing attorney's fees).

n517. *Va. Code Ann. 32.1-134.1* (Michie 1997).

n518. Id.

n519. Id.

n520. *Ariz. Rev. Stat. Ann. 36-445.02(B)* (West 1993).

n521. Id.

n522. *Cal. Civ. Pro, Code 1094.5(a)* (West Supp. 2000).

n523. Id. 1094,5(d).

n524. Id. 1094.5(h).

n525. *D.C. Code 32-1307(b),* 1390(c) (Michie 1998).

n526. Id. 32-1307(c) (Michie 1998).

n527. *Colo. Rev. Stat. 12-36.5-106 (lO)(a),* (b) (1999); N.Y. Pub. Health 2801-c (West 1993).

n528. *Colo. Rev. Star. 12-36.5-106* (1999); N.Y. Pub. Health 2801-c (West 1993).

n529. N.Y. Pub. Health 2801-b(2) (West 1993).

n530. N.Y. Pub. Health 2801-b(2) (West 1993). See also *Gelbard v. Genesee Hosp., 664 N.E.2d 1240, 1242-43 (N. Y. 1996)* (holding "physician must submit a complaint to the Public Health Council" before bringing an action of injunctive relief). The Public Health Council is composed of the State Commissioner of Health and 14 persons appointed by the governor with the advice and consent of the state senate. N.Y. Pub, Health 220 (West 1990).

n531. N.Y. Pub. Health 2801-b(3) (West 1993). See also *Gelbard, 664 N.E.2d at 1242* (discussing and explaining requirements of statute).

n532. N.Y. Pub. Health 2801-c (West 1993). See also *Gelbard, 664 N.E.2d at 1243* (plaintiff may bring action for injunctive relief to restore privileges only after PHC review but noting, without elaborating, that some claims may not be subject to requirement of PHC review).

n533. *Gelbard, 664 N.E.2d at 1243.*

n534. N.Y. Pub. Health 2801-c (West 1993).

n535. Id. See also *Gelbard, 664 N.E.2d at 1242* ("PHC's determination serves as prima facie evidence of the facts found therein" but "findings are accorded only presumptive, not conclusive, effect.").

n536. *Colo. Rev. Stat. 12-36.5-106* (1999).

n537. Id. The fifth member must be a licensed attorney with experience in antitrust law. Id. 12-36.5-106(2).

n538. Id. 12-36.5-106(7).

n539. Id. 12-36.5-106(9)(k)-(m).

n540. Id. 12-36.5-106(10). See also *Northern Colorado Med. Ctr., Inc. v. Committee on Anticompetitive Conduct, 914 P.2d 902, 905-06 (Colo. 1996)* (citing statute as support for appellate review); *Nicholas v. Northern Colorado Med. Ctr., Inc., 902 P.2d 462, 466 (Colo. Ct. App. 1995)* (stating statute "expressly confers a right to seek judicial review"), affd sub nom. *Northern Colo. Med. Ctr., Inc. v. Committee on Anticompetitive Conduct, 914 P.2d 902 (Colo. 1996).*

n541. *Colo. Rev. Stat. 12-36.5-106(8)* (1999). Claims of anticompetitive conduct that do not result from professional review committee activity also may be raised directly in a court. See Ryals v. St. Mary-Corwin Reg'l Med. Ctr., No. *99SC137, 2000 WL 1335873, at 1* (Colo. Sept. 18, 2000)

(holding Committee on Anticompetitive Conduct did not have jurisdiction over claims where denial of privileges was business decision not involving physician's qualifications or conduc0.

n542. See, e.g., *Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 (Alaska 1992)* (granting hospital governing body great deference regarding applications for hospital privileges); *Owens v. New Britain Gen. Hosp., 643 A.2d 233, 241 (Conn. 1994)* (noting that courts should usually defer to hospital board's decisions); *Dworkin v. St. Francis Hosp., Inc., 517 A.2d 302, 305 (Del. Super Ct. 1986)* (same); *Nanavati v. Burdette Tomlin Mem'l Hosp., 526 A.2d 697, 702-03 (N.J. 1987)* (same); *Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 750, 756 (W. Va. 1991)* (same).

n543. See *Kiester, 843 P.2d at 1223* (referring to "a hospital's recognized expertise regarding evaluation of medical qualifications"); *Owens, 643 A.2d at 241* (noting that determinations of professional competence "should be left to the expertise of the hospital's staff and administration").

n544. See, e.g., *Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100, 1102 (Colo. Ct. App. 1981)* (evaluating substantial compliance to bylaws); *Owens, 643 A.2d at 241-42 & n.28* (reviewing substantial compliance of hospital bylaws); *Stiller v. La Porte Hosp., Inc., 570 N.E.2d 99, 103 (Ind. Ct. App. 1991)* (limiting court's role to determining substantial compliance to bylaws); *Smith v. Our Lady of the Lake Hosp., Inc., 639 So. 2d 730, 755 (La. 1994)* (applying substantial compliance standard to hospital's adherence to bylaws); *Babcock v. St. Francis Med. Ctr., 543 N. W.2d 749, 761 (Neb. Ct. App. 1996)* (same); *Brinton v. IHC Hosps., Inc., 973 P.2d 956, 964-65 (Utah 1998)* (same); *Mahmoodian, 404 S.E.2d at 756* (same). But see *Berberian v. Lancaster Osteopathic Hosp. Ass'n, 149 A.2d 456, 459 (Pa. 1959)* (implying strict compliance standard); *Miller v. Indiana Hosp., 419 A.2d 1191,*

d193 (Pa. Super. Ct. 1980) (requiring strict compliance to bylaws).

n545. See *Brinton, 973 P.2d at 964* (allowing procedural fairness to be questioned, but refusing to evaluate medical judgment of hospital).

n546. See *Kiester, 843 P.2d at 1223* (stating "courts are equipped to determine whether a hospital governing body has followed its bylaws and whether a decision regarding an application for privileges was made in accordance with basic principles of fairness and due process"); *Owens, 643 A.2d at 241* (limiting review to considerations of basic notice and fair hearing procedures).

n547. See Cal. Code Civ. Pro. 1094.5(d) (West Supp. 2000) (establishing abuse of discretion standards; findings not supported by substantial evidence); *Sokol v. Akron Gen. Med. Ctr., 173 F.3d 1026, 1030 (6th Cir. 1999)* (reviewing for arbitrariness, abuse of discretion, supported by any evidence); *Kiester, 843 P.2d at 1223* (ensuring standards set by hospital not arbitrary and capricious); *Holmes v. Hoemako Hosp., 573 P.2d 477, 478-79 (Ariz. 1977)* (ensuring hospital rules not arbitrary and capricious); *Oskooi v. Fountain Valley Reg'l Hosp. &Med. Ctr., 49 Cal. Rptr. 2d 769, 774 (Cal. Ct. App. 1996)* (requiring substantial evidence); *Hawkins v. Kinsie, 540 P.2d 345, 349 (Colo. Ct. App. 1975)* (stating claim if decision is arbitrary, capricious, and unreasonable); *Dworkin v. St. Francis Hosp., Inc., 517 A.2d 302, 305-06 (Del. Super. Ct. 1986)* (confining court's role to determination of whether review committee decision was arbitrary or capricious); *Babcock, 543 N. W.2d at 760* (sufficient evidence, not arbitrary or capricious); *Nanvati v. Burdette Tomlin Mem'l Hosp., 526 A.2d 697, 702 (N.J. 1987)* (passing judicial review when decision supported by sufficient reliable evidence); *Guerrero v. Burlington County Mem'l Hosp., 360 A. 2d 334, 340 (N. J. 1976)* (determining whether decision supported by credible evidence, not arbitrary or capricious); *Bouquett v. St.*

Elizabeth Corp., 538 N.E.2d 113, 114 (Ohio 1989) (refraining from interfering unless decision was arbitrary, capricious, unreasonable, i.e., an abuse of discretion); *Mahmoodian, 404 S.E.2d at 762* (applying substantial evidence standard).

n548. *Babcoc& 543N.W.2d at 760.*

n549. See supra notes 89-168 and accompanying text for a discussion of these competing interests.

n550. Groseclose, supra note 90, at 2.

n551. See generally supra Part III for a discussion of the various theories of review.

n552. See supra note 173 and accompanying text for a discussion judicial review of public hospital actions.

n553. See generally supra Part III for a discussion of these various theories of review.

n554. See supra notes 270, 288 and accompanying text discussing review of decisions excluding physicians.

n555. See supra notes 448-548 and accompanying text for a discussion of these theories.

n556. See supra notes 159-60, 542-48 and accompanying text for a discussion of the deference courts afford hospital decisions.

n557. See supra note 547 and accompanying text for a discussion of standard of review.

n558. See, e.g., *Janda v. Madera Cmty. Hosp., 16 F. Supp. 2d 1181, 1186 (E.D. Cal. 1998)* (finding, under California law, physician can enjoin hospital); *Adkins v.*

Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 737 (Ill. 1989) (holding physician properly reinstated).

n559. See supra notes 159-60, 542-48 and accompanying text discussing deference courts afford hospital decisions.

n560. *Oskooi v. Fountain Valley Reg'l Hosp. & Med. Ctr., 49 Cal. Rptr. 2d 769, 776 (Cal. Ct. App. 1996)* (Sills, J., concurring).

n561. See supra notes 379-416 and accompanying text discussing contract theory.